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No. 03-

IN THE

Supreme Court of the United States

OZAN PATTERSON AND JOHN BALLENGER,

Petitioners,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ELLA RAY WHITEHEAD,

Petitioner,

v.

MOBIL OIL CORPORATION

Defendant-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the due process right to a fair and impartial adjudicator requires that appellate review of a disqualified judge's trial structure and process rulings be more independent and rigorous than a harmless-error analysis?

Whether a disqualified judge committed reversible error when he refused to permit Plaintiffs any discovery and awarded summary judgment to the Defendants?

PARTIES TO THE PROCEEDINGS

Petitioners are Ozan Patterson, John Ballenger, and Ella Ray Whitehead, individually and for deceased plaintiff Thomas J. Ballenger.

Respondents are Mobil Oil Corporation (now known as ExxonMobil Oil Corporation); Forum Insurance Company; Mobil Corporation; Glenda Matous, individually, and as an agent for Mobil Oil Corporation; Robert Gronwaldt, individually, and as an agent for Mobil Oil Corporation; Ben Stiff, individually, and as an agent for Mobil Oil Corporation; Charles Teeples, individually, and as an agent for Mobil Oil Corporation; National Union Fire Insurance Company of Pittsburgh, PA; AIG National Insurance Company; AIG Risk Management, Inc.; AIG Inc.; Energy Printing Inc.; American Home Assurance Company; and Insurance Company of the State of Pennsylvania.

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PETITION FOR A WRIT OF CERTIORARI

Ozan Patterson, John Ballenger and Ella Ray Whitehead, individually, and on behalf of deceased plaintiff Thomas J. Ballenger, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A, *infra*, 2a-27a) is reported at 335 F.3d 476 (5th Cir. 2003). That court's denial of Petitioners' motion for rehearing or rehearing en banc (App. B, *infra*, 28a-30a) is

unpublished. The judgment of the United States District Court for the Eastern District of Texas (App. C, *infra*, 31a-32a) is unreported. An earlier decision of the United States Court of Appeals for the Fifth Circuit denying a writ of mandamus seeking Judge Cobb's disqualification (App. D, *infra*, 33a) is unpublished. The Order of the United States District Court denying disqualification (App. E, *infra*, 34a-35a) is unpublished. The earlier opinion of the U.S. Court of Appeals for the Fifth Circuit vacating class certification (App. F, *infra*, 36a-40a) is reported at 241 F.3d 417 (5th Cir. 2001). The Order of the United States District Court for Eastern District of Texas on class certification (App. G, *infra*, 41a-__a) is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered July 8, 2003. App. A, 2a. A motion for rehearing and rehearing *en banc* was denied on August 7, 2003 (App. B, *infra*, 28a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED (SEE APPENDIX H)

The relevant provision of the Fifth Amendment to the United States Constitution is reproduced at App. H, *infra*, 45a.

28 U.S.C. §§ 144 and 455 are reproduced at App. H, *infra*, 45a.

The relevant provision of the Texas Workers' Compensation and Crime Victims Compensation Act is reproduced at App. H, *infra*, 49a.

INTRODUCTION

No judge should preside over a case in which he or an ex-partner served as counsel. The *per se* bias evident in those circumstances is compounded when, as here, the underlying dispute concerns allegations of fraud that may reflect upon

the judge's actions while in private practice or actions of his former partners. Equally problematic here, the judge likely had personal knowledge, obtained in private practice, of disputed facts material to the case. The judge's non-recusal, his refusal to permit discovery, and his award of summary judgment to his former clients should be subjected to exacting scrutiny to give meaning to the Due Process guarantee of a "neutral and detached judge in the first instance," *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972), and to the federal judicial disqualification statutes.

Confusion and disarray exist in the circuit courts as to how to remediate decisions by trial judges later found disqualified. If, as below, courts of appeal subject the disqualified judge's decisions to a review no more searching than they would a garden-variety appeal, appellate determinations of disqualification are toothless. This treatment licenses trial judges to press forward with decisions that they should not make and that infuse the remaining proceedings with a constitutionally and statutorily condemned bias.

STATEMENT OF THE CASE

United States District Court Judge Howell Cobb, whose rulings are the subject of this Petition, was a partner at Respondent Mobil Oil Corporation's (Mobil) law firm, Orgain, Bell & Tucker, then consisting of 12 attorneys, when an action was heard against Mobil for the wrongful death of their employee, Thomas J. Ballenger, in 1971. A jury found Mobil liable for gross negligence, but the Fifth Circuit reversed, restricting the plaintiff's recourse to the limited benefits available under the Texas workers' compensation system because Mobil asserted that it had the requisite insurance. The falsity of that representation was the subject of a Rule 60(b) motion by Petitioner Ella Ray Whitefield in the present case. Judge Cobb also personally represented Respondent Forum Insurance Company ("Forum") in a 1975 matter, where he asserted that Forum was Mobil's workers' compensation insurance carrier. Whether Forum was

Mobil's insurer is an issue central to the present matter. The judge's former law firm, Orgain, Bell & Tucker, and former partner, John Tucker, made appearances on behalf of Mobil in both the original *Ballenger* wrongful death action and today's *Patterson* case.

On March 23, 1999, Petitioner and former Mobil employee Ozan Patterson filed a class action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1861 *et seq.*, alleging that Respondents conspired over an almost 30-year period to misrepresent that Mobil had valid workers' compensation insurance coverage when it did not. Petitioner Whitehead that day filed a Rule 60(b) motion in the *Ballenger* wrongful death case in which Orgain, Bell & Tucker had been counsel when Judge Cobb was at that firm. She argued that Mobil had committed fraud on the court when it represented that it had valid workers' compensation insurance. Both cases involved claims arising from Respondents' representations about its participation in the Texas workers' compensation system. Petitioners alleged that Mobil's self-insurance scheme was illegal and disqualified Mobil as a "subscriber" to the workers' compensation system. Mobil's false claim of insurance enabled it to avoid suits by injured employees.

Both *Patterson* and *Ballenger* were assigned to Judge Joseph Fisher. In *Patterson*, Judge Fisher certified the class, denied Respondents' motion to dismiss, and entered a scheduling order authorizing discovery by both sides. Judge Fisher also denied Respondents' motions to quash Petitioners' noticed depositions.

Judge Fisher recused himself *sua sponte* on December 13, 1999 in *Patterson* and was immediately succeeded by Judge Cobb. Three days later, on December 16, 1999, Mobil filed a motion to vacate the class certification. After defense counsel made a personal visit to the court on Friday, December 17, 1999, the hearing for the motion to vacate the class certification was set for Tuesday, December 21, 1999, a violation of the notice provisions in the local rules. Plaintiffs

first received notice of the hearing on the afternoon of Saturday, December 18, 1999.

On December 20, 1999, the *Patterson* plaintiffs filed a motion for disqualification under 28 U.S.C. §§ 144, 455(a), and 455(b). The motion argued that Judge Cobb's association with John Tucker and the judge's past partnership in Orgain, Bell & Tucker, which represented Mobil on the central issue in the case—namely, whether the company had valid workers' compensation insurance over the nearly 30-year period—required disqualification. It asserted Judge Cobb had been counsel for a party and had personal knowledge of disputed facts. The motion further said that Judge Cobb's association with the firm at the relevant time period indicated that Judge Cobb might either have had a "personal bias or prejudice" or that "his impartiality might reasonably [be] questioned."

At the hearing the next day, Judge Cobb focused exclusively on the fact that neither Mr. Tucker nor Judge Cobb's old law firm were mentioned in the complaint. Judge Cobb then asked whether Plaintiffs anticipated suing Mr. Tucker or Orgain, Bell & Tucker. Plaintiffs' counsel reserved the right to sue if subsequent discovery supported that claim.

Judge Cobb also informed the parties that Mr. Tucker was not present because "he's gone to visit his children and grandchildren, I believe in North Carolina or maybe Tennessee, I'm not sure which" and then summarily denied the disqualification motion.

Judge Cobb implemented a stay of the entire case, including discovery, pending discretionary appeal to the Fifth Circuit on class certification, relief the Defendants had not sought.[1] The stay also prohibited the clerk from accepting any filings from the plaintiffs, although it allowed the defendants to make certain filings.

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[1] As a result of the stay, Plaintiffs were denied the opportunity to take any of the Rule 30 (b)(6) depositions that Judge Fisher had previously ruled could go forward.

Plaintiffs appealed Judge Cobb's ruling against disqualification by filing a writ of mandamus to the Fifth Circuit on January 3, 2000, which was denied one week later.

At this time, *Ballenger* was transferred to Judge Heartfield because Judge Fisher passed away. Upon discovering that a family member was an attorney of record for Mobil, Judge Heartfield recused himself before any ruling had been made on the pending Rule 60(b) motion. *Ballenger* was then transferred to Judge Cobb.

On March 1, 2001, the Fifth Circuit vacated the class certification ruling by the district court, effectively ending the stay placed upon the *Patterson* case. *Patterson v. Mobil Oil Corp.*, 241 F.3d 417 (5th Cir. 2001)(App. F, 36a-40a). Four days later, defendants moved for summary judgment. On March 14, 2001, Plaintiffs' counsel sought discovery by agreement without success.

On March 23, 2001, Plaintiffs filed a motion requesting additional time to conduct discovery, as well as opposition to the motion for summary judgment. Plaintiffs claimed that they have not "yet had the opportunity to conduct even the bare minimum discovery that they require to address the arguments advanced in Defendants' Motion." Plaintiffs painstakingly detailed the types of discovery they hoped to conduct and how the ability to discover certain facts would controvert statements made in the summary judgment motion. Furthermore, as the arguments advanced in the summary judgment motion were the same legal arguments already rejected in the Motion to Dismiss, Plaintiffs asserted that the summary judgment motion was an attempt to have Judge Cobb reconsider Judge Fisher's ruling.

On the same day, Plaintiffs' filed a supplemental motion to disqualify Judge Cobb based on newly available evidence. While Judge Cobb's prohibition on filings remained in effect, Plaintiffs had learned that Judge Cobb personally

represented Forum[2] in a 1975 action relating to a workers' compensation award against Mobil. In that matter, then-attorney Cobb signed an agreed judgment that was premised upon Forum's status as Mobil's *bona fide* independent workers' compensation insurance carrier. This information came out in discovery in an independent matter being litigated in state court, rather than through any disclosure by Judge Cobb.

While the motion for additional time was still pending, Plaintiffs noticed a number of depositions. On April 10, 2001, Mobil's motion to quash the outstanding notices of deposition and for protection from further discovery was granted, just two days after its filing.

Although Judge Cobb would not allow the plaintiffs to take a single deposition or otherwise conduct discovery, on February 8, 2002, he granted Defendants' motion to lift the stay on discovery so that they could depose Charles Wetterling, a Forum executive.

On March 28, 2002, Judge Cobb granted Defendants' Motion for Summary Judgment in *Patterson*, denied the Rule 60(b) motion to reopen the *Ballenger* case, and denied Plaintiffs' supplemental motion to disqualify. Regarding disqualification, he found "no new or valid reason has been asserted by the attorneys for Patterson and Ballenger which requires an additional result."

After Judge Cobb entered final judgment for Mobil, Plaintiffs discovered a privilege log in a related state action that showed Judge Cobb's additional involvement in Mobil's workers' compensation practices while he was in private practice. The privilege log showed that Judge Cobb, while in private practice, had a number of privileged communications with Mobil employees including an insurance claims adjuster. In addition, the privilege log also

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[2] Although Judge Cobb represented Forum, the bills for his services were sent directly to Mobil. Plaintiffs argued that this was evidence that Mobil and Forum acted as a single entity instead of in the separate roles of employer and insurer.

showed that Judge Cobb had a number of communications with an attorney who appeared as co-counsel in the *Ballenger* case during the relevant time period. This privilege log was included in the record on appeal.

On July 8, 2003, the Fifth Circuit held that Judge Cobb did not abuse his discretion in denying Plaintiffs' § 144 motion, but should have disqualified himself under § 455(a). It further held that its ruling on § 455(a) obviated the need to analyze disqualification under § 455(b). *Patterson v. Mobil Oil Corp.*, App. A, *infra*, at 11a. Still, it affirmed Judge Cobb in all other respects using a harmless-error analysis. While noting that Plaintiffs had been afforded no discovery, it treated Mobil's evidence in support of its summary judgment motion as conclusive and irrebuttable. Although the panel found many of Mobil's practices "improper or illegal" and intentionally designed to evade detection, the court found that Mobil's illegal conduct would not adversely affect Mobil's status as a workers' compensation-eligible employer. App. A, *infra*, at 14a. A petition for rehearing *en banc* was denied on August 7, 2003, with five of the circuit judges' recusing themselves from participation.

REASONS FOR GRANTING THE PETITION

The decision below of the United States Court of Appeals for the Fifth Circuit raises profound issues concerning the Due Process rights of litigants. Searching appellate review is needed when a federal trial judge, properly disqualified under § 455, denies a meritorious disqualification motion, issues rulings that go to the framework and structure of the trial process and then uses that ruling as the basis for disposing of the matter's merits. The Fifth Circuit departed from precedent, statutory requirements and practices developed to guarantee Due Process and meaningful enforcement of disqualification statutes. Therefore, many of the issues in this case are appropriate for an exercise of this Court's supervisory powers.

Petitioners were denied a fair trial before a neutral judge. No amount of appellate analysis could cure the denial. The trial judge, a former counsel in private practice for Respondents, who represented them on matters at issue in the present case, repeatedly demonstrated bias and foreclosed discovery by the plaintiffs. He then granted summary judgment to the defendant. The Fifth Circuit upheld summary judgment based on Petitioners' inability to produce evidence to demonstrate Respondents' fraudulent scheme, while treating Respondents' evidence as conclusive and irrebuttable. Denying discovery prevented plaintiffs from going behind the alleged fraudulent insurance documents and foreclosed any ability to respond to the summary judgment motion.

This decision conflicts with decisions of other United States courts of appeals and with decisions of this Court on an important and frequently recurring issue of law of great practical significance. Unlike the Fifth Circuit below, other circuit courts recognize that, consistent with the constitutional imperatives at stake, a more complete analysis is necessary than that afforded by harmless error of the dispositive motion. Those courts recognize that interlocutory orders can have a determinative effect on the merits of the case and that wholesale vacatur may well be necessary. Unless appellate courts uphold a plaintiff's right to discovery, a judge harboring a bias will have no incentive to recuse but significant reasons to maintain control of the case. That judge will rest assured that appellate review may well be deferential. Such a circumstance eviscerates the parties' entitlement to a neutral judge in the first instance.

The applicability of the "harmless error" analysis in disqualification cases is one that vexes the federal appellate courts and requires this Court's guidance. A survey of decisions reveals that the largest group of circuits entirely eschew harmless error. Others do so for criminal cases but not civil cases even though the federal disqualification statutes make no distinction between those categories. Still other courts apply harmless error only to certain categories

of issues decided by a disqualified judge, and a final group of courts applies it across the board. Without greater guidance, the observation of fundamental Due Process rights guaranteed by the United States Constitution, as well as by federal judicial disqualification law, will be more a matter of caprice than design.

I. THIS CASE SATISFIES SEVERAL KEY CONSIDERATIONS THAT GUIDE THIS COURT'S DISCRETION TO GRANT CERTIORARI

A. By Employing Harmless-Error Analysis to Rulings Made by a Judge with an Actual Conflict of Interest, the Fifth Circuit Has Decided an Important and Recurring Issue of Judicial Disqualification Law in a Manner That Conflicts with Recent Rulings of Other Circuits and the Teachings of this Court.

1. Many Circuits Eschew Harmless Error in Favor of Full Independent Review or Vacatur

This Court has repeatedly recognized that public confidence in the judiciary is critically important and may be irreparably harmed if a case is allowed to proceed before a judge who even appears to harbor bias. *See, e.g., Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 859-60 (1988). *See also* H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 (committee report accompanying 28 U.S.C. § 455). Contrary to the plenary use of harmless error approved by the court below, this Court has limited its approval of that analysis to instances, under 28 U.S.C. § 455(a), where "busy judges . . . inadvertently overlook a disqualifying circumstance" and thus have exhibited no real bias. *Liljeberg*, 486 U.S. at 862.

Here, the Fifth Circuit applied harmless error to a pervasive conflict of interest prohibited by 455(b). The Federal Judicial Center's manual on recusal reminds judges that this Court "cautioned against too casual a finding of harmless error." Federal Judicial Center, RECUSAL: ANALYSIS

OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144, at 66 (2002). That limited approval of harmless error remains consistent with this Court's repeated teachings that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 (1967). Among that "limited class of fundamental constitutional errors" is a biased trial judge. *Neder v. United States*, 527 U.S. 1, 7-8 (1999), *citing Tumey v. Ohio*, 273 U.S. 510 (1927).

The courts are deeply divided, sometimes even within the same circuit, about the appropriate remedy for rulings made by a judge who should have granted a motion to disqualify. For example, the Fifth Circuit in this case ruled that harmless-error analysis applied to evaluating all rulings by a judge who should have been disqualified. The Court acknowledged that three recent cases decided by the Circuit held otherwise; namely, that rulings by a judge who should have been disqualified must be vacated. *Patterson*, App. A, *infra*, at 11a, citing *Republic of Panama v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000), *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir. 1999), and *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998). It chose, however, to follow an older line of cases without overruling the more recent precedents or indicating when or whether they still apply.

This duality in approach is evident in other circuits as well and requires this Court's guidance. *See, e.g., Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527-28 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989)(applying harmless error), *but see In re BellSouth Corp.*, 334 F.3d 941, 949-50 (11th Cir. 2003)(limiting authority of disqualified judge to housekeeping rulings). Even though the judicial disqualification statutes make no distinction between civil and criminal cases, the Tenth Circuit applies harmful error to civil disqualification cases but not criminal trials. *See, e.g., Harris v. Champion*, 15 F.3d 1538, 1571 (10th Cir. 1994)(applying harmless error to civil cases), *but see United States v. Edward J.*, 224 F.3d 1216, 1223 (10th Cir.

2000)(recognizing that instances involving a "biased trial judge" are not subject to harmless-error analysis).

A more sensible and more due-process sensitive approach, in conflict with the Fifth Circuit below, was adopted by the Third Circuit. First, the court outlined five fundamental approaches that could be taken: (1) "vacate all orders after the date on which the appearance of partiality arose;" (2) "vacate all orders after the date on which [the judge should have been aware of] facts creating the appearance of partiality;" (3) "vacate all orders after the date on which [a party] moved for disqualification;" (4) "vacate orders qualitatively, rather than chronologically—according to the nexus between the order and the [reason for disqualification];" or (5) "combine the qualitative and chronological approaches." *In re School Asbestos Litigation*, 977 F.2d 764, 786 (3d Cir. 1992). The Court then chose a sixth alternative. It authorized "the incoming judge to reconsider earlier rulings on these matters at his or her discretion." *Id.* None of these approaches employed harmless error.

Even while leaving review in the hands of a new trial judge, the Third Circuit left undisturbed its earlier ruling that it was proper to vacate a disqualified judge's rulings in order to preserve the integrity of the system. *Moody v. Simmons*, 858 F.2d 137, 138 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

Implementing this schema, a federal trial court held that *vacatur* was an appropriate remedy "because it completely dissipated any taint of partiality in discretionary discovery rulings that shaped the context of summary judgment." *Rohrbach v. AT&T Nassau Metals Corp.*, 915 F. Supp. 712, 717 (M.D. Pa. 1996). While acknowledging that *de novo* appellate review of summary judgment usually is sufficient protection, "largely discretionary discovery decisions" require greater and more searching scrutiny better accomplished by applying *de novo* review. *Id.* at 717-18. If new evidence arose, the court then indicated it would

entertain *de novo* consideration of summary judgment as well. *Id.* at 718.

Reversal of rulings by disqualified judges appears to be the preferred approach of the First, Fourth, Sixth, Seventh, and Ninth Circuits. In these circuits, the general rule is where the "trial judge has wrongly failed to disqualify him or herself, the remedy to correct this situation is for the appellate court to reverse the decision of the case on the merits and to order a new trial before a different judge." *Pontarelli v. Stone*, 978 F.2d 773, 775 (1st Cir. 1992).

The same conclusion was reached by the Fourth Circuit. *Arnold v. Eastern Air Lines, Inc.*, 712 F.2d 899, 904 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)("a judge who is disqualified from acting must not be able to affect the determination of any cause from which he is barred"). Similarly, the Sixth Circuit held that a judge's substantive authority in a case ceases as of the time a disqualification motion, eventually sustained, is filed. *In re Aetna Cas. & Surety Co.*, 919 F.2d 1136, 1145-46 (6th Cir. 1990)(en banc).

In a Federal Tort Claims Act case, the Ninth Circuit recognized, "[t]here is no way, however, to purge the perception of partiality . . . other than to vacate the judgment and remand the case to the district court for retrial by a different judge." *Preston v. United States*, 923 F.2d 731, 735 (9th Cir. 1991). While recognizing new trials add expense, the court quoted the Fifth Circuit's statement that "'unfairness and expense which results from disqualification . . . can be avoided in the future only if each judge fully accepts the obligation to disqualify himself in any case in which his impartiality might reasonably be questioned.'" *Id.*, quoting *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980).

The Seventh Circuit agrees and held that the approach that "best carries out the purposes of § 455" is that "orders rendered after the filing of the [disqualification] motion must be vacated . . . if the motion ultimately is granted." *New York City Dev. Corp. v. Hart*, 796 F.2d 976, 979 (7th Cir.

1986)("the position that provides the greatest measure of safety for the judicial system as a whole is one that vacates all decisions taken after the filing of a justified motion to disqualify a judge")(per curiam). The only limitation on that position, the court recently held, was when full plenary appellate review is available. *Williamson v. Indiana Univ.*, 345 F.3d 459, 464-65 (7th Cir. 2003).

The Fifth Circuit is in severe conflict with these other circuits.

2. The Fifth Circuit's Treatment of the Trial Court's Refusal to Allow Discovery also Conflicts with the Uniform Holdings of this Court and Other Circuits

In *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), this Court held that Fed. R. Civ. P. 56(c) mandates an "adequate time for discovery" prior to allowing the entry of summary judgment. Adhering to this precedent, all circuits, including the Fifth Circuit, have repeatedly recognized that a party opposing a motion for summary judgment is entitled to some discovery. *See, e.g., Carmona v. Toledo*, 215 F.3d 124, 132-33 (1st Cir. 2000) (instructing that "[a] moving party may not satisfy its initial burden of production . . . if the non-moving party has not had adequate opportunity to discover material facts supporting its claim"); *Vance v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996) (stating "the general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery"); *Burnside-Ott Aviation Training Ctr., Inc. v. United States*, 985 F.2d 1574, 1582 (Fed. Cir. 1993) (recognizing that summary judgment was inappropriate unless "a tribunal permits the parties adequate time for discovery"); *Snook v. Trust Co. of Georgia Bank, N.A.*, 859 F.2d 865, 870 (11th Cir. 1988)(finding that "summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests")(citing *Cowan v. J.C. Penney Company, Inc.*, 790 F.2d 1529, 1532 (11th Cir. 1986)).

The Fifth Circuit also has recognized the need to allow some discovery prior to granting summary judgment. *See Brown v. Mississippi Valley State Univ.*, 311 F.3d 328, 333 (5th Cir. 2002); *F.D.I.C. v. Shrader & York*, 991 F.2d 216, 220 (5th Cir. 1993).

Therefore, under both precedent from this Court, the Fifth Circuit's own precedent, and precedent from various other courts of appeals, the trial court's denial of any opportunity for discovery was an abuse of discretion that requires reversal.

B. The Issue Presented is an Important Federal Question of Recurring and Great Practical Significance

There can be little doubt that the Fifth Circuit's decision poses an important question about the standard and scope of appellate review when a judge who should have disqualified himself or herself makes structural rulings that control the outcome of subsequent dispositive motions. Its treatment of the specific grounds for mandatory and non-waivable recusal under § 455(b) as interchangeable with the waivable appearance standard of § 455(a), following one other circuit,[3] presents an issue of overriding importance to the rights at issue and requires this Court's guidance.

In practical effect, the decision below eviscerates the law of judicial disqualification by enabling a biased jurist to limit appellate review to questions of law predetermined by the judge's control over the evidentiary record. Such review is insufficient. As this Court has noted, "[w]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986).

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[3] *Harris v. Champion*, 15 F.3d 1538, 1571 (10th Cir. 1994), cited in *Patterson*, App. A, *infra*, at 12a

In circumstances meriting disqualification, as the Third Circuit recognized, "[d]eferential review after final judgment might not cure any prejudice." *In re School Asbestos Litigation*, 977 F.2d at 787. Yet, some Federal appellate courts accord no additional significance to the fact that the appeal results from a judge disqualified for bias, and they employ the same standard of review that applies to any garden-variety appeal.

Due Process and the judicial disqualification statutes demand a more searching review, either by the appellate tribunal or by a new trial judge. Judicial impartiality is the cornerstone of the fair administration of justice. No principle is more central to the constitutional guarantee of Due Process, *Tumey*, 273 U.S. at 523, nor to public respect and confidence in the integrity of the judicial process. *Liljeberg*, 486 U.S. at 860. For that reason, it is a bedrock principle that a tribunal must not just be free from bias, but also "must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Disqualification law serves to implement these fundamental Due Process concerns. Thus, Federal law requires disqualification both in specific forms of likely bias, 28 U.S.C. § 455 (b), as well as where a judge's "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). When an appellate court must order disqualification, Congress "delegated to the judiciary the task of fashioning the remedies that will best serve the purpose of the legislation." *Liljeberg*, 486 U.S. at 862.

Those remedies will not meet the high requirements of Due Process if they fail to assure that litigants have a "neutral and detached judge in the first instance." *Ward v. Village of Monroeville*, 409 U.S. 57, 62 (1972). In situations such as the instant matter, where allegations of bias were sufficient to merit disqualification and post-disqualification rulings control the disposition of the case, harmless-error review is inadequate. The circuit courts, evidently confused

on how to approach these matters, need this Court's guidance on the appropriate standard of review.

In fact, courts have struggled with fashioning a consistent approach to the discharge of that responsibility, and their holdings are in disarray. Some courts apply a harmless-error approach to civil cases, while condemning the same standard in criminal matters. *See, e.g., Harris,* 15 F.3d at 1571 (applying harmless error analysis to both § 455 (a) and § 455(b) violations in civil cases), *but see Edward J.,* 224 F.3d at 1223 (holding decisions of disqualified judge not subject to harmless-error analysis in criminal cases); *Parker v. Connors Steel Co.,* 855 F.2d 1510, 1527-28 (11th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989)(harmless error in civil cases), *but see United States v. Guzman,* 167 F.3d 1350, 1352 n.5 (11th Cir. 1999)(reversal in criminal cases). *Compare Liljeberg,* 486 U.S. at 862 (approving harmless error in limited instances where the judge merely overlooked grounds for disqualification)[4], *with Arizona v. Fulminante,* 499 U.S. 279, 309 (1991)(recognizing that a judge lacking impartiality constitutes a structural defect in the trial mechanism that defies harmless-error analysis).

The civil-criminal distinction drawn by those courts has no basis in 28 U.S.C. § 455. As the leading treatise on federal civil procedure puts it:

> If, upon review, the appellate court considers that the judge erred in not disqualifying himself, the judgment or order will be set aside and the case remanded for reconsideration before a different judge. There should be no room in this context for the concept of harmless error to apply, nor for arguments to be made that in fact the judge acted in

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[4] Courts of appeals appear to have read *Liljeberg's* approval of limited harmful-error application more broadly than this Court's opinion would support. *See, e.g., United States v. O'Keefe,* 128 F.3d 885, 892 (5th Cir. 1997)(stating that the "'harmless error' standard is used to determine whether orders that a judge issues after the judge has, or should have, recused himself must be vacated" and citing *Liljeberg*). The Fifth Circuit relied upon *O'Keefe* in *Patterson,* App. A, *infra,* at 11a.

> an impartial manner. The disqualification statutes are mandatory and *failure of a judge to step aside if he is indeed disqualified under one of the three statutes always should require reversal.*

23A Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3553, p. 657 (emphasis added).

It is understandable that courts may be reluctant to engage in wholesale vacatur in every instance where a trial judge must be disqualified. Prudential reasons may exist to fashion a different remedy when the costs to the parties for retracing steps years in the making are too great or where the potential for prejudice is nonexistent or negligible. However, when a trial judge denies a disqualification motion, continues to rule on structural issues in the matter, and then grants summary judgment to the defendants, as occurred here, proper review demands exacting scrutiny. Standard approaches to review, adequate for most appeals, are woefully inadequate in light of meritorious disqualification issues.

Some courts of appeals, as the Fifth Circuit did below, mistakenly hold that *de novo* review of a disqualified judge's summary judgment ruling provides adequate protection. *See, e.g., Patterson,* App. A, *infra,* at 12a. Yet, a summary judgment ruling is irreparably tainted when a disqualified judge denies any opportunity for discovery despite a party's full compliance with the terms of Rule 56(f). In this instance, Judge Cobb denied plaintiffs an opportunity to obtain rebuttal evidence to oppose summary judgment. His ruling conflicts with this Court's holding that summary judgment is only available after "adequate time for discovery." *Celotex,* 477 U.S. at 322. A proper review by an appellate court should pierce the veil of summary judgment and reexamine the underlying rulings that structured that decision.

Even then, the usual procedure is inadequate. A trial judge's discovery decisions are generally reviewable under the "abuse of discretion" standard. *See, e.g., In re Ford Motor*

Co., 345 F.3d 1315, 1316 (11th Cir. 2003)(citation omitted). The Fifth Circuit employed that standard to sustain the trial judge's discovery ruling in this case. *Patterson*, App. A, *infra*, at 24a. However, where sufficient bias, real or perceived, exists to warrant disqualification, the resulting limited review cannot comport with either Due Process or the purposes of the federal statutory scheme. *See, e.g., In re School Asbestos Litigation*, 977 F.2d at 787 (finding such review inadequate to overcome prejudicial effects). A more muscular approach to appellate review would implement this Court's declaration that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Reasonable doubt is abundantly present when, as here, the critical factual issue—whether Respondent Mobil Oil had an insurance policy sufficient to qualify Mobil as a subscriber under Texas workers compensation law—could only be supported by the Plaintiffs after taking discovery.[5]

This Court has recognized the critical role that discovery plays in our system: the civil rules "restrict the pleadings to the task of general notice-giving and *invest the deposition-discovery process with a vital role in the preparation for trial.*" *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)(emphasis added). Reliance on an abuse standard or harmless-error

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[5] The Court of Appeals determined that this issue was dispositive and wrongly treated Mobil's evidence as conclusive and irrebuttable, as if it were a question of law. *Patterson*, App. A, *infra*, at 16a-17a. Yet, the evidence proffered by Mobil consisted of or was based on declaration pages that were alleged to be part of a fraudulent scheme and not the insurance policies themselves or receipts for premium payments. Subsequent to summary judgment, in a separate matter still pending in state court, discovery revealed that at least some of those declaration pages were created wholly apart from any valid insurance policy, supporting Petitioners' allegations that they were part of a fraudulent conspiracy. Thus, it is reasonable to believe that focused discovery would have assisted Petitioners in supporting their allegations, rebutting the evidence proffered by Mobil, and established there existed a material factual dispute sufficient to overcome summary judgment.

analysis fails to acknowledge Petitioners' right to and need for compulsory process in order to develop and present critical evidence.

In today's environment, where criticism of judges and courts is rapidly becoming a national pastime and allegations of judicial bias pervade the public discourse, remedies for meritorious disqualification motions are and will continue to be a significant part of the Federal appellate docket. *See, e.g.*, Federal Judicial Center, Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144, at v, 73-84 (2002); Amy J. Shimek, *Professional Responsibility Survey: Recusal*, 73 DENV. U. L. Rev. 903 (1996).

Without review, the decision of the Fifth Circuit creates a license for a biased judge to limit appellate review to ultimate decisions and renders the law of judicial disqualification superfluous. Certiorari is necessary because the scope of review of disputed rulings in instances of judicial disqualification varies among the circuit courts, affects fundamental Due Process rights, undermines public confidence in the courts, and renders federal disqualification statutes meaningless.

II. THE DECISION BELOW WAS INCORRECT

This case transcends a mere appearance of impartiality. Petitioners sought Judge Cobb's disqualification under 28 U.S.C. §§ 144 and 455. Judge Cobb was a partner in Orgain, Bell & Tucker when it represented Mobil in the original *Ballenger* case, which is the subject of a Rule 60(b) motion in this case. Orgain, Bell & Tucker, including Judge Cobb's former partner John Tucker, continued to represent Mobil in the same matter before Judge Cobb. Judge Cobb also had represented Forum, where he made representations regarding the very facts at issue in this matter.

Judge Cobb refused to disqualify himself, exhibited hostility to Petitioners' claims in court, held hearings upon insufficient notice, displayed knowledge of Respondents' counsel's whereabouts that only could have been obtained

ex parte, and denied Petitioners (but not Respondents) any opportunity to take discovery. Judge Cobb then challenged Petitioners, without discovery, to contravert Mobil's evidence put forth for summary judgment. The record below shows that regardless of the information brought before Judge Cobb in multiple attempts to urge recusal, he was not willing to recuse himself unless the Petitioners could prove that either his former law firm or his former partners were directly implicated in the fraudulent conspiracy at issue, despite the fact that this is not the standard for disqualification under either 28 U.S.C. § 144 or § 455. The Fifth Circuit found that disqualification was required but that its impact was ultimately harmless. The rulings, imbued with bias throughout, required a more independent examination than harmless error provides.

A. The Fifth Circuit Erred by Applying an Inadequate Standard of Review to a Case of Bias Under 28 U.S.C. §§ 144 and 455

This case is a direct appeal involving violations of 28 U.S.C. §§ 144 and 455. The court below did not address the § 455 (b) violation because it acknowledged a violation under § 455(a).[6] It reasoned that a violation of either provision could be remedied by harmless-error analysis. *Patterson*, App. A, *infra*, at 12a. Neither *Liljeberg*, other decisions of this Court, nor the judicial disqualification statutes support this conclusion.

The Fifth Circuit ignored the fact that *Liljeberg* was a collateral attack addressing a lesser bias under §455(a) that did not necessarily predetermine the outcome of the final judgment. Even so, this Court vacated the final judgment and ordered a new trial for disqualification violations under both §455(a) and §455(b). *Liljeberg*, 486 U.S. at 867. *Liljeberg* does not suggest a harmless-error analysis for violations of § 455 (b). On the contrary, *Liljeberg* clearly states that the remedy when a judge should have been disqualified should

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[6] The court also found the § 144 affidavit insufficient.

be fashioned to the circumstances of the case. *Id.* at 863-64. Cases involving non-waivable or actual bias demand a heightened standard and scope of appellate remedy.

Judge Cobb's relationship with the law firm representing Mobil and his personal knowledge of disputed facts from that period of private practice establish an actual conflict of the type condemned by Congress in 28 U.S.C. §§ 455 (b)(1) and (b)(2).[7] *See, e.g., Murray v. Scott*, 253 F.3d 1308 (11th Cir. 2001)(appearance as counsel in earlier matter could have given him knowledge of disputed facts and merited recusal); *In re Rodgers*, 537 F.2d 1196 (4th Cir. 1976)(membership in law firm at time of issue in controversy required recusal). Judge Cobb's representation as counsel of record in a matter in which the same factual issue was present compounded the conflict.

The greater seriousness of conflicts under 455(b) is emphasized by the House Committee, which noted that allowing a judge to sit when even a small interest is at stake "may well be inconsistent with due process." H.R. Rep. No. 93-1453, *reprinted in* 1974 U.S.C.C.A.N. at 6356. For this reason, conflicts under § 455 (b) are not waivable. 28 U.S.C. § 455(e). That non-waivable status indicates that when a judge has actual bias it is more egregious than instances that qualify under the appearance standard of § 455(a). The deference inherent in harmless-error review is not appropriate to remedy the presence of actual bias.

A direct appeal calls for a more searching review than when issues are raised collaterally. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993); *Anderson v. Cowan*, 227 F.3d 893, 898 n.3

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[7] 28 USC Section 455(b) provides, in relevant part:

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter.

(7th Cir. 2000) (suggesting that enactment of 28 U.S.C. § 2254(d) broadened the difference recognized in *Brecht*).[8] In a direct appeal, such as the one at issue here, the district court judge will always have knowledge of the bias at issue. Affirmative disclosure by Judge Cobb of his earlier representation was required under § 455. *Liteky v. United States*, 510 U.S. 540, 548 (1994). Such disclosure was not made.

The idea that a more demanding remedy is required when the actual bias of a judge can taint his decisions has been noted by this Court before. *See Vasquez*, 474 U.S. at 263 ("when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired"). For that reason, where substantial grounds exist to believe actual bias infected the process, it is error to begin any analysis from the decision of the disqualified judge. Instead, an independent analysis, under most circumstances by a new trial judge, is necessary. *Compare Sullivan v. Louisiana*, 508 U.S. 275, 283 (1993)(Rehnquist, C.J., concurring) (stating that the evil of structural errors is their restriction of a party's opportunity to put on evidence).

A § 455 (b) violation therefore demands that a reviewing court be open to a level of review that assures that actual bias not color a particular result. *See, e.g., Rorhbach*, 915 F. Supp. 712 (finding that, in a case involving a § 455(a) violation and possible § 455(b) violation, *de novo* review of discovery rulings to which plaintiffs took exception was warranted).

Additionally, the Fifth Circuit incorrectly applied a harmless error remedy to the §455(a) violation present in this direct appeal. *Liljeberg* recognized the appropriateness of harmless-error analysis only in a subset of § 455 (a)

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[8] There is also no need in this case to balance the equitable interests present in a Rule 60 analysis. *See Liljeberg*, at 862 n.9 (the complexity of determining whether a conflict existed "may have a bearing on the Rule 60(b)(6) extraordinary circumstance analysis").

matters where the potential for actual bias is slight. *Liljeberg*, 486 U.S. at 862. Specifically, *Liljeberg* applied harmless error analysis to disqualification of a judge who had no knowledge of alleged conflicts and whose sitting created a perception of bias in a Rule 60 proceeding. This analysis was premised upon the following policy consideration:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error *committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of Section 455(a).*

Id. at 862 , (emphasis supplied, footnote omitted). This policy consideration does not apply to the facts of this case. Judge Cobb was repeatedly reminded of his bias, did not allow any opportunity for discovery and then ruled in favor of his former clients because he assumed that Petitioners could not set forth any evidence to controvert the pending summary judgment motion. Therefore, the §455(a) violation present in this case similarly cannot be remedied with harmless-error review.

Based upon an illusory precedent that *Liljeberg* clearly did not establish, the Fifth Circuit's application of harmless-error analysis to the § 455 violations here yielded a result that is inconsistent with the purpose of the judicial disqualification statutes and the Due Process Clause. This result does nothing to provide Petitioners with their right to an impartial judge, nothing to remedy a grievous error fairly attributable to bias, and nothing to bolster public confidence in an unbiased judiciary. The Fifth Circuit, and other circuit courts that follow this line of reasoning, are wrong as a matter of law. *See, e.g., Harris*, 15 F.3d at 1571 (finding violations of both §455(a) and (b) on direct appeal and applying harmless error).

B. Refusing to Permit any Opportunity for Discovery Before Granting Respondents' Summary Judgment Is an Abuse of Discretion

The Fifth Circuit found the trial court did not abuse its discretion by refusing to allow Petitioners an opportunity to conduct discovery because it was reasonable to believe that discovery would not have assisted their legal arguments. *Patterson*, App. A, *infra*, at 24a. In addition to being patently wrong, this proposition contradicts this Court's holdings that a motion for summary judgment may not be decided until after the party opposing the motion has had an adequate opportunity to develop the factual record. *Celotex Corp.*, 477 U.S. at 322 (recognizing that the plain language of Rule 56(c) mandates an "adequate time for discovery" prior to allowing the entry of summary judgment).

Decided that same day, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986), noted that summary judgment should be entered against a plaintiff who does not raise a genuine issue of material fact only "as long as the plaintiff has had a full opportunity to conduct discovery." Reviewing the Supreme Court's decisions in *Celotex*, *Liberty Lobby*, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Eleventh Circuit concluded that "the common denominator of the three cases is that summary judgment may only be decided upon an adequate record." *Snook*, 859 F.2d at 870 (internal quotations omitted).

Even if the failure to accord discovery were reviewed under a deferential abuse of discretion standard, Petitioners would prevail because they met all the requirements of Fed. R. Civ. Pro. 56(f). *Compare, e.g., Access Telecom Inc. v. MCI Telecommunications Corp.*, 197 F.3d 694, 720 (5th Cir. 1999) (holding that "[w]hen a party is not given a full and fair opportunity to discover information essential to its opposition to summary judgment, the limitation on discovery is reversible error"). Where plaintiffs have lost summary judgment motions because no evidence could support their claims, courts have emphasized that they had been at least afforded ample opportunity for discovery. *See, e.g., Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 896 (6th Cir. 1991). As Petitioners here survived a

motion to dismiss, took the additional steps of seeking time for discovery, were prohibited from taking any discovery, filed an affidavit detailing the necessary discovery and what that discovery would likely yield, and explained how this discovery could controvert the evidence presented by Mobil in support of its motion for judgment, the Fifth Circuit was incorrect when it upheld the trial court as not abusing its discretion.

Additionally, the Fifth Circuit, under its own analysis, erred in holding that there was no abuse of discretion because it failed to allow discovery on the issue of whether a premium had been paid.[9] The Fifth Circuit stated that "discovery was *not likely* to change the outcome of the summary judgment motion." *Patterson*, App. A, *infra*, at 24a (emphasis added). However, the court acknowledged that the Texas Workers' Compensation Act requires a premium payment as a prerequisite to subscriber status. *Patterson*, App. A, *infra*, at 16a-19a; Tex. Rev. Civ. Stat. Ann. art. 8309, § 1 (Vernon 1967) (stating that a "subscriber" is "any employer who has become a member of the association by paying the required premium," to a carrier or other insurance company authorized to write workers' compensation policies"). As the court noted, neither Mobil nor Forum produced

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[9] The Petitioners requested other discovery as well, which arguably could affect the outcome of whether Mobil was a valid subscriber on this issue of first impression in Texas. In their motion for additional discovery and opposition to summary judgment, Petitioners requested, *inter alia*, discovery regarding whether Mobil adjusted its own claims. Under *Aranda v. Ins. Co. of N. Am*, 748 S.W.2d 210, 212 (Tex. 1988), the law requires that the compensation carrier, not the employer, must handle the processing of compensation claims. Petitioners also requested, *inter alia*, the ability to discover evidence relating to self-insurance. Texas law prohibited an employer from being self-insured for workers' compensation coverage. *Brookshire Grocery Co. v. Bomer*, 959 S.W.2d 673 (Tex. App. Ct. 1997). The ability to take discovery on these issues in a related state court action involving the same defendants led to a final judgment that "the defense of having a genuine workers' compensation insurance was not available to Defendants." *Kirkendall v. National Union Fire Ins. Co. of Pittsburg, PA*, No. A-144,481-D (D. Tex. May 30, 2003) (App. I, 50a-55a at 51a.

evidence that any premium was paid that would entitle Mobil to subscriber status. *Patterson*, App. A, *infra*, at 16a. With respect to the years 1982-93, when Mobil claimed it was insured by AIG, the court itself acknowledged that Mobil did not pay the required premium, but nonetheless had the insurer file a policy with the state, which Petitioners claimed was part of the conspiracy. App. A, *infra*, at 19a. Due to the Fifth Circuit's misapplication of recognized Texas law to the few facts available without discovery, the court incorrectly held that Mobil was a "subscriber" as a matter of law.[10]

Discovery is especially critical in a fraud case because fraud is proved by inference and since "fraud and conspiracy are not generally practiced in the open light of day ... [they] must be spelled out from circumstantial evidence." *Vogelsang v. Wolpert*, 227 Cal. App. 2d 102, 111 (Cal. Ct. App. 1964). Here, evidence relevant to whether Mobil's assertions of subscriber status were fraudulent was wholly within the possession and control of the Respondents. Had discovery been allowed, Judge Cobb would presumably have been forced to enter summary judgment in Petitioners' favor on the issue of whether Mobil was a subscriber during the years AIG fronted for Mobil. Moreover, it is not unreasonable to believe that Mobil used the same scheme and failed to pay premiums during the years it claimed Forum as its insurer. However, as Judge Cobb prohibited any discovery on this issue, he assured a victory in favor of his former clients. The Fifth Circuit upheld this victory by ignoring the abundance of law that holds that refusing to allow any discovery on genuine issues of material fact, despite a proper Rule 56(f) showing, was an abuse of discretion. Reversal is required.

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[10] As the Petitioners suspected, there are additional reasons to believe that Mobil never paid the premiums that were a prerequisite to claiming status as a subscriber. A related state case recently confirmed that Mobil never paid a premium to AIG for its workers' compensation insurance, which is consistent with what the Fifth Circuit discussed. *Patterson*, App. A, *infra*, at 19a.

C. Even Under a Harmless-Error Review, Summary Judgment Must Be Reversed.

The Fifth Circuit reached an insupportable conclusion after applying a harmless-error test to the acknowledged violation of § 455 (a) and the violations of § 455(b). When listing the three factors to consider when reviewing a § 455(a) violation for harmless error, the *Liljeberg* Court cautioned against too casual a finding of harmless error because "'justice must satisfy the appearance of justice.'" *Liljeberg*, 486 U.S. at 864 (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). Thus, on the basis of a mere appearance of impartiality, the *Liljeberg* Court held that vacatur of the final judgment in that case and a new trial were appropriate remedies.

The Fifth Circuit failed to acknowledge that the overall injustice to the parties in this case was far more severe. *Compare Patterson*, App. A, *infra*, at 12a-16a (failing to take into account the absolute denial of discovery prior to the motion for summary judgment and concentrating *de novo* review solely upon the lack of genuine issues of material fact) *with Liljeberg*, 486 U.S. at 847. Instead of a trial judge who did not know of the conflict but had a duty to stay informed as to possible conflicts, Judge Cobb was frequently made aware of the grounds for bias, failed to come forward with facts regarding an actual conflict of interest on his own accord, and disregarded the allegations of bias. As a result, a judge with palpable bias was able to influence the outcome of a case by refusing any opportunity for discovery and then premising his dispositive ruling on the lack of disputed material evidence. The injustice in this case was therefore a denial of a fair trial and due process of law. Such a deprivation cannot be harmless.

The Fifth Circuit's analysis of the two remaining harmless-error factors, the risk of injustice in other cases and the risk of undermining the public's confidence in the judicial process, was also fatally flawed. *Liljeberg*, 486 U.S. at 864. The risk of injustice in allowing actual bias of a judge to

permeate a case and control its outcome is of the utmost gravity. *See In re Allied-Signal, Inc.*, 891 F.2d 967, 973 (1st Cir. 1989)(stating, in a harmless error analysis, that the denial of retrospective relief would not produce injustice in other cases because there was no allegation "that actual bias has infected any findings or rulings"). An allegedly impartial review of that final outcome, premised upon the lack of controverted evidence when there was no opportunity to develop that evidence, is an exercise in circular reasoning. It cannot cure this fundamental miscarriage of justice.

If the lower court's harmless-error ruling is allowed to stand, judges who should have been recused will be encouraged to make rulings that dispose of the cases before them while remaining confident that they will be clothed in the protective garb of harmless error. This is not mere speculation. In this case, Mobil urged Judge Cobb to limit discovery even while plaintiffs' motion for disqualification was pending. Mobil assured the court that "the orders it enters before and after deciding that motion are subject to a harmless error review in the event the Court should have disqualified himself." Defendants' Response to Plaintiffs' Motion for Clarification and Reconsideration of Court's Order of April 12, 2001, at 3, App. J, *infra*, 56a-66a. Finally, the public's confidence in the judicial process will clearly be undermined when an apparently biased judge controls the outcome of a case. The Fifth Circuit's "notion that all conflicts fade with time" is no solace when the time period in question is material to the development of the fraud at issue in the case. *Patterson* App. A, *infra*, at 14a). Therefore, the failure of Judge Cobb to recuse himself combined with his order precluding discovery and his award of summary judgment to Respondents, was not harmless but constituted fundamental error.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that certiorari be granted.

Respectfully submitted,

November 5, 2003

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APPENDIX A: Opinion of the United States Court of Appeals for the Fifth Circuit, 335 F.3 476 (5th Cir. 2003).

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 02-40698.

OZAN PATTERSON, Individually & as Rule 23 Class Representative on behalf of all other similarly situated individuals; John Ballenger, Individually & as Rule 23 Class Representatives on behalf of all other similarly situated individuals,

Plaintiffs-Appellants,

versus

MOBIL OIL CORPORATION; Forum Insurance Company; Mobil Corporation; Glenda Matouse, Individually & as Agent for Mobil Oil Corporation; Robert Gronwaldt, Individually & as agent for Mobil Oil Corporation; Ben Stiff, Individually & as agent for Mobil Oil Corporation; Charles Teeples, Individually & as Agent for Mobil Oil Corporation; National Union Fire Insurance Company of Pittsburgh, PA; AIG National Insurance Company; AIG Risk Management Inc.; AIG Inc.; Energy Printing Inc.; American Home Assurance Company; Insurance Company of the State of Pennsylvania,

Defendants-Appellees.

Thomas J. Ballenger,

Plaintiff,

Ella Ray Whitehead,

Appellant,

versus

MOBIL OIL CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Texas

July 8, 2003.

Before EMILIO M. GARZA and DeMOSS, Circuit Judges, and DUVAL*, District Judge.

EMILIO M. GARZA, Circuit Judge:

This case arises from a wave of state and federal litigation brought by employees and former employees of Mobil, as well as their relatives. Generally, the employees assert that Mobil failed to comply with Texas workers' compensation law, such that Mobil was never a valid subscriber to the workers' compensation system. Under Texas's scheme, employees covered by subscriber-purchased policies receive compensation on a no-fault basis, and, in exchange, subscribing employers benefit from an exclusive remedy provision. This provision prevents employees from suing subscribers for negligence. Thus, the theory is that these employees were injured because Mobil's allegedly fraudulent representations that it was a subscriber caused them to forgo negligence lawsuits against Mobil.

In the instant case, the plaintiffs, Ozan Patterson and John Ballenger, are using this theory to allege a variety of civil violations under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1861 et seq. Originally, Patterson and Ballenger brought this suit as a

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* District Judge of the Eastern District of Louisiana, sitting by designation.

class action under Fed. R. Civ. P. 23, but we previously vacated the district court's class certification. *See Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir.2001). Upon remand, the district court granted summary judgment to the defendants. The plaintiffs timely appeal.

I

The issues presented by this case necessitate a detailed recitation of the facts and procedural background, including a brief summary of the allegations in the pleadings and the roles of the parties. In the primary cause of action, the plaintiffs allege that Mobil violated RICO by conspiring with various insurers and claims adjusters over a thirty-year period (hereinafter "the RICO suit"). Specifically, they allege that the defendants engaged in a long-term scheme to deprive the plaintiffs of their common-law negligence causes of action against Mobil for workplace injuries. Mobil allegedly used "fronting" insurance companies to obtain "sham" workers' compensation policies in order to hide the fact that it was self-insuring, which was not permitted by the Texas workers' compensation scheme then in force. Further, the plaintiffs allege that the defendants used the interstate mail and telephone wires to further this illegal enterprise.

During the relevant years, Mobil obtained its workers' compensation insurance from several different companies. Pre-1970 through 1981, Mobil's insurer was Forum Insurance Company ("Forum"); from 1982 through 1991, Mobil's insurer was National Union Fire Insurance Company of Pittsburgh, Pennsylvania; in 1992, Mobil's insurer was American Home Assurance Company; and, in 1993, Mobil was insured through the Insurance Company of the State of Pennsylvania. All are named as defendants in the RICO suit. The latter three insurers are members of the American International Group of Companies ("AIG") and other various AIG companies have also been named as defendants (collectively, the "AIG Defendants"). In addition, the plaintiffs have sued Glenda Matous and Robert Gronwaldt, representatives of AIG who adjusted Mobil

workers' compensation claims, individually and as agents of Mobil.

Patterson was a Mobil employee from 1947 to 1982. In 1974, 1976, 1979, 1981, and 1982, Patterson suffered on-the-job injuries. For each injury, Patterson sought and received workers' compensation benefits from Mobil's various insurers. Ballenger is the son of Thomas J. Ballenger, who died in 1970 from burns sustained after an explosion at a Mobil plant. Ballenger's mother, Ella Ray Whitehead, sought and received workers' compensation benefits from Forum, Mobil's carrier at that time. She also filed suit, on behalf of her and her surviving children, against Mobil, claiming gross negligence and seeking punitive damages. *See Ballenger v. Mobil Oil Corp.*, 488 F.2d 707, 708-09 (5th Cir.1974). The jury found Mobil grossly negligent, but we reversed, concluding that the evidence did not support that finding. *Id.* at 708, 713. During that suit, Mobil stated in its pleadings that it had workers' compensation insurance.

On March 23, 1999, the same day the plaintiffs filed the RICO suit, Whitehead filed a "Request for Relief from Judgment" under Fed. R. Civ. P. 60(b) ("the Rule 60(b) motion"). She requested that the district court set aside the 1974 *Ballenger* judgment, arguing that Mobil had perpetrated a fraud on the court by representing that it had workers' compensation insurance.[1]

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[1] This case also has an extended and complex litigation history in state court. First, both plaintiffs were members of a class action suit, filed in 1992, which involves similar theories and defendants. *McClelland v. Gronwaldt*, No. A-144,481 (58th Dist. Ct., Jefferson County, Tex.). Most recently, a Texas Court of Appeals reversed the class certification on procedural grounds. *See Gronwaldt v. McClelland*, Nos. 09-99-125-CV, 09-99-591-CV, 2000 WL 800572, at *5 (Tex.App.--Beaumont June 22, 2000, no pet. h.) (unpublished).

In addition, on October 5, 1998, Patterson and Ballenger filed separate suits based on various state causes of action in the 60th Judicial District of Jefferson County, Texas. *Patterson v. Mobil*

The RICO suit was originally assigned to Judge Fisher. Just after granting class certification, Judge Fisher recused himself, *sua sponte*, without explanation. The case was reassigned to Judge Cobb.[2] The defendants immediately moved to have the certification order vacated, arguing that it was inappropriate for Judge Fisher to have ruled on the issue since nobody knew why Judge Fisher recused himself or when the conflict came to Judge Fisher's attention.

The plaintiffs moved to have Judge Cobb recuse himself, citing 28 U.S.C. § § 144 and 455 as support. Specifically, they alleged that disqualification was mandatory because John Tucker, a partner in Judge Cobb's former law firm, Orgain, Bell & Tucker, L.L.P. ("OB&T"), represented Mobil in the original *Ballenger* suit while Judge

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Corp., No. B-159,657 (60th Dist. Ct., Jefferson County, Tex.); *Whitehead v. Mobil Corp.*, No. B-159,657 (60th Dist. Ct., Jefferson County, Tex.). The Ballenger case is set for trial in September 2003.

Although not all of the above information on the state court proceedings is part of the record on appeal, we may take notice of pending judicial proceedings. *See, e.g., Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 246 n. 3 (5th Cir.1997). In fact, Patterson and Ballenger have formally moved us to take judicial notice of several documents. We grant the motion with respect to (1) the transfer order from the 58th Judicial District Court of Jefferson County, and (2) the letter agreement setting the Ballenger trial for September 23, 2003. We deny the motion with respect to Mobil's state court pleading (document 3). The AIG Defendants opposed this motion and conditionally requested that we take judicial notice of an October 4, 2002 state court hearing transcript. That motion is denied.

[2] Judge Cobb also ended up with the Rule 60(b) motion. Initially, the motion was assigned to Judge Fisher, but it was reassigned to Judge Heartfield after Judge Fisher passed away. Upon discovering that a family member was an attorney of record for Mobil, Judge Heartfield recused himself, and the motion was reassigned to Judge Cobb.

Cobb was still a partner at that firm. The plaintiffs also argued that Judge Cobb's impartiality might reasonably be questioned because of his relationship with Tucker and OB&T. Finally, they contended that Judge Cobb was actually biased because he might be required to consider the actions of his former law partner and law firm during the course of the case. In particular, they noted that Tucker was one of the lawyers representing Mobil in the RICO suit.[3] The plaintiffs also submitted an affidavit from John Ballenger in which he stated that he believed Judge Cobb was biased against his case and would not be able to preside impartially over the RICO suit.

At the hearing on the defendants' motion to vacate, Judge Cobb asked the plaintiffs whether Tucker or OB&T were mentioned in the complaint or whether the plaintiffs were seeking recovery against Tucker or the firm. The plaintiffs answered no to both questions, and Judge Cobb denied the motion to disqualify. Following this, the plaintiffs petitioned this court for a writ of mandamus, seeking Judge Cobb's disqualification, and we denied that petition. *In re Patterson,* No. 00-40001 (5th Cir. Jan. 10, 2000) (unpublished) (order denying mandamus).

After this court reversed the class certification, the defendants moved for summary judgment and the plaintiffs made a supplemental motion for disqualification. The basis of the plaintiffs' motion was new evidence that Judge Cobb had represented Forum in a Mobil workers' compensation case in 1975. *See Forum Ins. Co. v. Mitchell,* No. A-98,195 (58th Dist. Ct., Jefferson County, Tex. Apr. 25, 1975) (unpublished). They contended that this gave Judge Cobb personal knowledge of relevant facts, including whether Forum was a sham company that was actually controlled by

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[3] Tucker is not listed as an interested party or counsel at the beginning of Mobil's appellate brief, but he was listed as Of Counsel for Mobil at least as late as December 16, 1999, when the defendants filed their motion to vacate the class certification.

Mobil at that time and whether Mobil was a valid subscriber in the Texas workers' compensation system. The defendants opposed the motion. Judge Cobb noted in a later order that he was asked to recuse himself in an earlier stage of the *McClelland* litigation[4] for similar reasons, but had refused to do so. In one of his final memorandum orders, Judge Cobb explicitly stated that his position as Forum's counsel of record twenty-seven years ago in a separate litigation did not warrant disqualification and emphasized that the plaintiffs' earlier attempt to secure disqualification from this court had been unsuccessful. He then denied the motion to disqualify.

In a separate order, the district court granted the defendants' motion for summary judgment and denied the Rule 60(b) motion. Plaintiffs now appeal Judge Cobb's refusal to stand recused and the adverse summary judgment ruling.[5]

II

We first address the recusal issue. The denial of a motion to recuse is reviewed for abuse of discretion. *Matassarin v. Lynch*, 174 F.3d 549, 571 (5th Cir.1999) (citing *In re Billedeaux*, 972 F.2d 104, 106 (5th Cir.1992)).

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[4] At one point, Mobil removed the *McClelland* litigation to federal court on grounds of federal question jurisdiction. On interlocutory appeal, we held that federal question jurisdiction was lacking and that an exercise of supplemental jurisdiction would be an abuse of discretion. *McClelland v. Gronwaldt*, 155 F.3d 507, 521 (5th Cir.1998). Thus, we remanded the case to state court. *Id.*

[5] Plaintiffs do not, however, brief the merits of the Rule 60(b) motion. Although they contend the ruling should be vacated because Judge Cobb erred by failing to stand recused, they do not point to any legal error in the Rule 60(b) ruling. Issues not briefed on appeal are waived. *See United States v. Thames*, 214 F.3d 608, 611 n. 3 (5th Cir.2000). Thus, we consider the Rule 60(b) ruling only as it relates to the recusal issue.

A

Under 28 U.S.C. § 144, a judge is to recuse himself if a party to the proceeding "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party ...." A party may only file one such affidavit for that case. *Id.* In addition, the affidavit must be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard" unless good cause is shown, and the affidavit must state the facts and reasons for the party's belief that bias or prejudice exists. *Id.*

This provision relates only to charges of actual bias. *Henderson v. Dep't of Pub. Safety & Corr.*, 901 F.2d 1288, 1296 (5th Cir.1990). When a party files a § 144 motion, the judge must pass on the sufficiency of the affidavit, but may not pass on the truth of the affidavit's allegations. *Id.* A legally sufficient affidavit must: (1) state material facts with particularity; (2) state facts that, if true, would convince a reasonable person that a bias exists; and (3) state facts that show the bias is personal, as opposed to judicial, in nature. *Id.*

Admittedly, Judge Cobb did not specifically address the sufficiency of Ballenger's § 144 affidavit during the hearing or in his written order. He did, however, refer to the recusal analysis he published in the *McClelland* case. *See McClelland v. Gronwaldt*, 942 F.Supp. 297, 299-303 (E.D.Tex.1996). In that case, the plaintiffs filed a § 144 motion and accompanying affidavit, arguing that Judge Cobb was biased because of his association with OB&T. Judge Cobb's ruling on the issue went into painstaking detail and concluded that McClelland's affidavit failed the reasonable person test. *Id.* at 301.

Although Ballenger's affidavit is slightly more specific than the one at issue in *McClelland*, we find that it suffers from the same overall defect. Judge Cobb's relationship with Tucker and OB&T is, by itself, insufficient to convince a reasonable person that Judge Cobb would be

biased against the plaintiffs or in favor of Mobil. Tucker's representation of Mobil in the *Ballenger* suit is also insufficient. That suit was litigated more than twenty-five years ago, and it has little bearing on the merits of the present action. It was a workers' compensation suit involving Mobil, and Mobil's participation in Texas's workers' compensation system had no direct bearing on whether it was grossly negligent with regard to the explosion that fatally injured Ballenger's father.[6] Finally, Judge Cobb's representation of Forum on a separate matter from long ago does not prevent him from ever hearing cases in which Forum or Mobil are parties. *See Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1166 (5th Cir.1982). Thus, we conclude that Judge Cobb did not abuse his discretion when he denied the plaintiffs' § 144 motion.

B

Recusal is also addressed in 28 U.S.C. § 455.[7] The

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[6] We recognize that the issue is tangentially related to the present suit. Obviously, if Mobil's subscriber status had been found invalid in 1971, then Whitehead and her children would have been able to sue Mobil for simple negligence. Nonetheless, the possibility that another cause of action against Mobil might have been available thirty years ago is remote and speculative. It is not as if Whitehead attempted to bring a negligence suit at the time and failed. Accordingly, that possibility has no bearing on whether a reasonable person would think Judge Cobb, a man with considerable judicial experience, would actually be biased all these many years later.

[7] In relevant part, 28 U.S.C. § 455 reads as follows:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts

plaintiffs continue to argue that Judge Cobb was required to recuse himself under § 455(a), § 455(b)(1), and § 455(b)(2). We consider each in turn, again reviewing for abuse of discretion. *United States v. Monroe*, 178 F.3d 304, 309 (5th Cir.1999).

When considering a claim under § 455(a), we must consider "whether a reasonable and objective person, knowing all of the facts, would *harbor doubts* concerning the judge's impartiality." *In re Chevron U.S.A., Inc.*, 121 F.3d 163, 165 (5th Cir.1997) (internal quotation marks omitted) (emphasis added). This is because the goal of this provision is to "avoid even the appearance of partiality." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988) (internal quotation marks omitted). Thus, recusal may be required even though the judge is not actually partial. *In re Cont'l Airlines Corp.*, 901 F.2d 1259, 1262 (5th Cir.1990).

The plaintiffs have a stronger argument under this provision than under § 144, although we are not convinced that these facts would cast doubt in a reasonable person's mind regarding Judge Cobb's impartiality. At first glance, a reasonable person might be inclined to think Judge Cobb could be biased in favor of his former law partner and firm, especially given Judge Cobb's participation in at least one similar case. But a reasonable person would temper this inclination with the knowledge that the events in question occurred almost three decades ago. Thus, considering *all* the relevant facts, one could conclude that Judge Cobb did not abuse his discretion with regard to § 455(a). Nevertheless, we recognize that this is a close question. " '[I]f the question

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concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it ....

of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal.' " *In re Chevron*, 121 F.3d at 165 (quoting *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir.1995)); *see also In re Faulkner*, 856 F.2d 716, 721 (5th Cir.1998) (noting that " '[p]eople who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges' " (quoting *Liljeberg*, 486 U.S. at 864-65, 108 S.Ct. 2194)). We are bound to conclude that, given the specific facts alleged in the plaintiffs' original and supplemental motions to disqualify, Judge Cobb should have recused himself under § 455(a). Thus, we need not address the other provisions of § 455.

C

1

Although we conclude that Judge Cobb should have stood recused under § 455(a), we do not automatically vacate the rulings issued after he should have recused himself. In our circuit, the "harmless error" rule has long been applied in this context. *Monroe*, 178 F.3d at 309; *United States v. O'Keefe*, 128 F.3d 885, 892 (5th Cir.1997); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 458-59 (5th Cir.1996); *In re Continental*, 901 F.2d at 1263. We consider the following factors in determining whether reversal or vacation is mandated: (1) the risk of injustice to the parties in this case; (2) the risk that denial of relief will create injustice in other cases; and (3) "the risk of undermining the public's confidence in the judicial process." *Liljeberg*, 486 U.S. at 864, 108 S.Ct. 2194; *In re Continental*, 901 F.2d at 1263.

The plaintiffs dispute the applicability of the harmless error rule, arguing that when a judge erroneously fails to stand recused, our precedent dictates that the judge's post-recusal orders must be automatically vacated. *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir.1998); *see also Republic of Pan. v. Am. Tobacco Co.*, 217 F.3d 343, 347 (5th Cir.2000) (citing *Tramonte*); *Trevino v. Johnson*, 168 F.3d 173, 178 (5th Cir.1999) (same). To the extent *Tramonte* and the cases that cite it are inconsistent with *In re Continental* and

its progeny, the older line controls. *Diamond Offshore Co. v. A & B Builders, Inc.*, 302 F.3d 531, 541 n. 9 (5th Cir.2002) (reiterating that one panel of this court cannot overrule an earlier panel's decision). This conclusion is bolstered by the fact that the rule established in *In re Continental* is based on the clear wording of *Liljeberg*, wherein the Supreme Court stated "relief is ... neither categorically available nor categorically unavailable for all § 455(a) violations." 486 U.S. at 864, 108 S.Ct. 2194. *Liljeberg* also announced the factors applied by this court in *In re Continental*. *Id.*

Finally, although the plaintiffs focus many of their recusal arguments on § 455(b)(2), we reiterate that we need not consider Judge Cobb's decision with respect to this provision. It could only be relevant if the harmless error test applied to § 455(a), as we conclude above, but not to § 455(b). For the reasons given in *Harris v. Champion*, 15 F.3d 1538 (10th Cir.1994), we are confident that § 455(b) violations are also subject to the doctrine of harmless error. *Id.* at 1571.

2

We now apply the harmless error test of *In re Continental* to the district court's subsequent rulings; specifically, its summary judgment ruling in the RICO suit and its denial of the Rule 60(b) motion. With regard to the first prong, we noted in *In re Continental* that the "risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight." 901 F.2d at 1263. Because we review a summary judgment ruling *de novo*, using the same standards as the district court, the parties are guaranteed a fair, impartial review of the merits of the ruling. As we stated in *In re Continental:* "In cases where we would otherwise affirm such a ruling, little would be gained by vacating and remanding with instructions that it be essentially reinstated." *Id.*

The grant or denial of Rule 60(b) relief is reviewed for abuse of discretion, however. *Flowers v. S. Reg'l Physician Servs., Inc.*, 286 F.3d 798, 800 (5th Cir.2002). Nonetheless,

given the long period of time between the original *Ballenger* judgment and the Rule 60(b) motion, as well as the motion's unique relationship to the RICO suit, we find that the possibility of injustice to the parties is slight. The Rule 60(b) motion is premised on Mobil's alleged fraud with respect to its subscriber status. Accordingly, the merits of the motion will be determined by our *de novo* evaluation of the district court's summary judgment ruling, which was based on the fraud issue. Thus, we find the first prong of the harmless error test satisfied.

Next, we consider whether it is likely that our refusal to vacate the post- recusal orders would create injustice in future cases. Again, we note that other cases appealed after a summary judgment ruling will receive fair, impartial treatment from this court. Moreover, our holding that Judge Cobb erred by failing to stand recused will serve as a cautionary note to future district courts considering recusal motions in similar circumstances. Thus, we find the risk of injustice to other cases to be slight, and so the second prong is met.

Finally, we do not believe the public's confidence in the judicial process will be undermined if we hold the violation of § 455(a) to be harmless error. The public will recognize that we have clarified that, under these circumstances, a judge should recuse himself. In addition, reasonable people will recognize that almost thirty years passed between the events in question and the district court's present rulings. The notion that all conflicts fade with time is a strong one, and we are confident that this notion will moderate the public's reaction. In fact, in light of the long passage of time, the public may be more inclined to lose faith in the system if this court were to mindlessly vacate Judge Cobb's rulings. *See In re Continental*, 901 F.2d at 1263. Thus, we find that the § 455(a) violation constituted harmless error.

III

A

Finding the recusal error to be harmless, we turn to the merits of the district court's summary judgment ruling. The district court held that the defendants were entitled to summary judgment because the evidence showed that Mobil had workers' compensation insurance from 1961 through 1995, and thus was a subscriber in Texas's system. Further, it held that Ballenger and Patterson had not raised a genuine issue of material fact as to whether Mobil's arrangements with its various workers' compensation insurers were fraudulent under Texas law.

Thus, the district court's decision was based entirely on Texas law. For this reason, Mobil, Forum, Matouse and Gronwaldt have asked this Court to certify the following question to the Texas Supreme Court:[8]

Where an employer is the holder of a policy of workers' compensation insurance from an authorized insurer and gives notice of such to its employees, is the employer's right to the exclusive remedy provisions available to a "subscriber" under the Texas Workers' Compensation Act conclusively established?

The plaintiffs oppose this motion, arguing that we should not ask the Texas Supreme Court to consider this case because the record is too undeveloped. Alternatively, the plaintiffs ask that we abate this appeal pending the outcome of Ballenger's state court action.

The decision of whether to certify a question lies within our sound discretion. *Nationwide Mut. Ins. Co. v. Unauthorized Practice of Law Comm.*, 283 F.3d 650, 656 (5th Cir.2002). As a general rule, we do not use certification as a

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[8] The AIG Defendants do not oppose this motion. Instead, they ask that, should we grant certification, we also certify several sub-issues. We treat this as a second motion for certification.

"panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state." *Free v. Abbott Labs., Inc.*, 164 F.3d 270, 274 (5th Cir.1999) (internal quotation marks omitted). Although the state law questions created by this case are important and complex, we feel, for the reasons given *infra* in Part III.B, that Texas law is sufficiently clear. Accordingly, we deny the defendants' motions to certify and we deny the plaintiffs' motion to abate the appeal.

B

As noted above, we review a grant or denial of summary judgment *de novo*, using the same criteria employed by the district court. *Mongrue v. Monsanto Co.*, 249 F.3d 422, 428 (5th Cir.2001). Summary judgment is proper if, drawing all inferences in favor of the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(c). Generally, the plaintiffs must establish a genuine issue of material fact regarding Mobil's status as a workers' compensation subscriber.[9] We consider each of the

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[9] The plaintiffs argue that Mobil bears the burden of establishing its status as a workers' compensation subscriber. We disagree. In a common-law negligence suit, Mobil would be required to prove its subscriber status as part of its affirmative defense that it was entitled to the exclusive remedy protections of the workers' compensation system. This is not a common-law negligence suit, however. It is a RICO action. To maintain a civil RICO action using mail and wire fraud as the predicate acts, the plaintiff must show that the defendant engaged in a scheme to defraud and used the mail or wires to execute that scheme. *See* 18 U.S.C. § § 1341, 1343, 1961(1)(B). In the present case, the plaintiffs argue that the scheme to defraud was Mobil's false representations to its employees that it was a subscriber. Thus, it is the plaintiffs' burden to show that a scheme to defraud existed by showing that Mobil was not a subscriber. Of course, if a party bears the burden of proof at trial, it also bears that burden at the summary judgment stage. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-26, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

plaintiffs' contentions in turn.[10] At the outset, however, it should be emphasized that although we conclude that many of Mobil's actions were improper or illegal, these actions did not affect its status, under Texas law, as a workers' compensation subscriber and thus did not affect its entitlement to the exclusive remedy protection of the workers' compensation system.

1

First, the plaintiffs argue that Mobil was not a subscriber during the years that Forum was its insurer because Mobil and Forum have not proven that Mobil actually purchased policies from Forum during the relevant years. Moreover, the plaintiffs emphasize that Forum was a subsidiary of Mobil and that Forum was completely controlled by Mobil. According to the plaintiffs, Forum was nothing more than a "front for self-insurance" and so Mobil was not a valid subscriber.

Under the relevant statutory scheme, a workers' compensation subscriber is defined as "any employer who has become a member of the association *by paying the required premium;* provided that the association holds a license issued by" the Texas Commissioner of Insurance. Tex.Rev.Civ. Stat. Ann. art. 8309, § 1 (Vernon 1967) (emphasis added). "Association" is defined as the state-

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[10] At the outset, we note that the period of time covered by the RICO suit spans two different workers' compensation systems in Texas. The "old" system, adopted in 1914 and repealed in 1991, was codified at Tex. Rev. Civ. Stat. Ann. arts. 8306 *et seq.* The current scheme is codified at Tex. Lab. Code Ann. § 401 *et seq.* We have considered both and find them to be substantively identical for the purposes of our analysis. In addition, none of the parties suggest that the outcome of this suit depends on differences between the two schemes. Thus, for clarity and brevity, we refer only to the "old" scheme because that scheme was in effect during most of the twenty-odd years at issue, although our legal conclusions hold for both.

created workers' compensation carrier "or other insurance company authorized" to write workers' compensation policies. *Id.* Thus, the plaintiffs are correct that, in order to achieve subscriber status, Mobil was required to obtain a workers' compensation policy by paying a premium to an authorized insurer.[11]

In response to this allegation, the defendants produced the following proof: (1) Certificates of Authority for Forum issued by the State of Texas, which indicate that Forum was authorized to write workers' compensation insurance during the relevant period; (2) declaration pages from the workers' compensation policies issued by Forum from 1970 to 1981, accompanied by the sworn affidavit of an authorized agent for Forum stating that the declaration pages were true and correct copies; and (3) copies of notices of coverage from the Industrial Accident Board, indicating that Mobil was a subscriber in the system during each of the eleven years. Despite this overwhelming proof, the plaintiffs persist in their argument that there is a genuine issue of material fact because (1) the defendants have not produced the policies themselves, but only the declaration pages, and (2) Mobil and Forum have not shown that the premium funds actually exchanged hands. We find these arguments to be meritless. *Martinez v. H.B. Zachry Co.*, 976 S.W.2d 746, 748 (Tex.App.--Houston [1st Dist.] 1998, pet. denied) (finding a copy of the information page of a workers' compensation policy, accompanied by a sworn affidavit from an agent stating that the copy was true and correct, to

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[11] Mobil was also required to provide notice to its employees that it was a participant in the workers' compensation system, either by filing constructive notice with the Industrial Accident Board or by providing actual notice. Tex. Rev. Civ. Stat. Ann. art. 8306, § 3c, art. 8308, § § 18a-20 (Vernon 1967). Mobil submitted summary judgment evidence that it provided both kinds of notice during the entire time period in question, and plaintiffs do not dispute this. For the purposes of this case, we consider the notice requirement to be met.

be sufficient to establish the employer was a subscriber at the summary judgment stage); *see also Dealers Nat'l Ins. Co. v. Simmons,* 421 S.W.2d 669, 672 (Tex.Civ.App.--Houston [14th Dist.] 1967, writ ref'd n.r.e.) (accepting copy of voluntary endorsement and testimony of employer that policy had been issued but destroyed after it expired as evidence that the policy was issued). The plaintiffs cannot suggest that there is a genuine issue of material fact on this point simply by listing the other possible evidence of coverage that Mobil and Forum could have produced.

Likewise, we reject the plaintiffs' self-insurance argument.[12] The workers' compensation scheme does not forbid an employer and an insurer from being one and the same. *Otis Elevator Co. v. Allen,* 185 S.W.2d 117, 120 (Tex.Civ.App.--Forth Worth 1944) (explicitly allowing an authorized insurer to carry workers' compensation insurance on its own employees), *aff'd in relevant part and rev'd on other grounds,* 143 Tex. 607, 187 S.W.2d 657, 658-59 (1945). Even assuming the plaintiffs are correct that Forum was under Mobil's complete control during some or all of the relevant years, this is immaterial. Forum was authorized by the State of Texas to write workers' compensation policies, and Mobil obtained just such a policy. Thus, the

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[12] In fact, we find the plaintiffs' argument on this point to be smoke and mirrors. Generally, "self insurance" means that one has established reserves for future losses instead of purchasing insurance. Such action would certainly fall outside the bounds of Texas's "old" workers' compensation system. But Mobil and Forum have essentially uncontroverted evidence of insurance policies and repeated contractual relationships. Under Texas law, if a Mobil worker was injured during the term of one such policy, Forum would be liable for any workers' compensation benefits awarded, not Mobil. *See, e.g., Aranda v. Ins. Co. of N. Am.,* 748 S.W.2d 210, 212 (Tex.1988). In addition, because Forum was an authorized workers' compensation insurer, the State of Texas was able to monitor the financial stability of Forum during the policy periods. Thus, this arrangement is materially different from "self insurance."

requirements of the statutory scheme were met, and, as a matter of law, Mobil was a subscriber.

2

Second, the plaintiffs contend that Mobil was not a subscriber during the years it was insured by the AIG Defendants, 1982 through 1993, because the AIG Defendants only fronted coverage for Mobil and thus Mobil was actually self- insured. This self-insurance argument is similar to the one mentioned above, *see supra* Part III.B.1, but the alleged scheme is slightly more complex. During this period, Mobil supposedly engaged in a cash-flow retrospective plan. Under this plan, Mobil had the insurer file a conventional retrospective rated insurance policy with the state, but did not actually pay the premium indicated by that policy. Instead, Mobil paid only a fraction of that premium to cover the insurer's expected losses paid, expenses, insurance risk premium and premium taxes. In addition, Mobil issued letters of credit to the insurer for the difference between the conventional premium and the amount actually paid. Mobil also reinsured the insurer's risk through an off-shore subsidiary. Through this complex arrangement, Mobil and its reinsurance subsidiary became the true insurers of the risk associated with Mobil's workers' compensation program.

Mobil does not dispute that it used this "cash-flow retro" plan. Instead, it argues that such an arrangement does not invalidate its subscriber status because its side agreements with the insurer and reinsurer are immaterial. Our review of the summary judgment evidence leads us to believe that Mobil's cash-flow retro plan was, at the very least, highly improper. Mobil was aware that such a plan had been formally forbidden by the Texas State Board of Insurance,[13] but chose to use a cash-flow retro plan anyway

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[13] In 1980, the State Board of Insurance issued Workers' Compensation Bulletin No. 511, which clearly stated that "paid loss retrospective" or "cash flow" plans were of great concern to the

because it was significantly cheaper. Moreover, Mobil designed the arrangement with a number of safeguards to avoid detection. Nonetheless, Mobil is correct that, under Texas law, its status as a subscriber was not invalidated by its use of this arrangement.

The wording of the Texas Insurance Code is clear:

> The Board [of Insurance] shall prescribe a uniform policy for workmen's compensation insurance ... and *any contract or agreement not written into the application and policy shall be void and of no effect* and in violation of the provisions of this subchapter, and shall be sufficient cause for revocation of license to write workmen's compensation insurance within this State.

Tex. Ins. Code Ann. art. 5.57 (emphasis added). Further, the Texas courts have repeatedly held that a "side agreement to a valid and enforceable workers' compensation policy which violates a statutory or regulatory requirement is invalid and ineffective." *Brookshire Grocery Co. v. Bomer*, 959 S.W.2d 673, 676 (Tex.App.--Austin 1997, pet. denied) (listing cases); *Associated Employer Lloyds v. Dillingham*, 262 S.W.2d 544, 546 (Tex.Civ.App.--Forth Worth 1953, writ ref'd) (holding that a contract to rebate part of the premium in the policy, directly or indirectly, is illegal and void and cannot be a defense to a suit for the full premium brought by the insurer's receiver); *Glenn H. McCarthy, Inc. v. Knox*, 186 S.W.2d 832, 836-38 (Tex.Civ.App.--Galveston 1945, writ ref'd w.o.m.) (same).

Thus, the cash-flow retro agreements between Mobil

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department because they fell outside the uniform policy approved by the board and referred to in Tex. Ins. Code art. 5.57. The bulletin concluded that insurers "that write such plans are subjecting themselves to possible disciplinary action by this Department." It did not, however, indicate that use of such a plan would invalidate an employer's subscriber status. Thus, this bulletin is not probative of the legal issue before us.

and the AIG Defendants were illegal and void. The conventional policies executed by the parties and filed with the state remained in full force and effect during the years in question. If the AIG Defendants had become bankrupt and their trustees had chosen to sue Mobil for the premiums it did not pay, Mobil might well have been liable. In addition, if the scheme had been discovered by the appropriate state agencies, Mobil and the AIG Defendants would undoubtedly have been fined, and the AIG Defendants might have lost their workers' compensation insurance licenses. *See* Tex. Ins. Code Ann. art. 5.57. But nothing in Texas's statutory law or case law suggests that these illegal cash-flow retro arrangements would have affected Mobil's subscriber status.[14]

The defendants have provided copies of the entire policies issued by the AIG Defendants to Mobil for the relevant policy years, as well as authenticating affidavits. We have examined the policies and find no mention of a rebate system or cash-flow arrangement in any of them. We conclude that these policies remained valid during their terms and satisfied the necessary conditions for Mobil to achieve subscriber status. *See Tankersley v. Durish,* 855 S.W.2d 241, 248 (Tex.App.--Austin 1993, writ denied) ("Where the illegal agreement is not incorporated in the policy, but is apart from it, the policies themselves are valid."); *see also* Tex. Ins. Code Ann. art. 5.57; Tex. Rev. Civ.

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[14] Presumably, this reflects a conscious choice by the state legislature and judiciary. It is not our task to say what sanctions are appropriate in this context. In fact, a bias against depriving employers of their subscriber status for this type of violation may be wise. It creates a level of certainty in the workers' compensation system and ensures that workers will not be deprived on the benefits of the system every time an employer or insurer violates the state's various administrative rules and regulations. *See, e.g., Larchmont Farms, Inc. v. Parra,* 941 S.W.2d 93, 95 (Tex.1997) (concluding that "Texas [has] an interest in maintaining a stable workers' compensation system").

Stat. Ann. art. 8309, § 2 (Vernon 1967) (stating that when an authorized insurer "issues a policy conditioned to pay [workers'] compensation, the holder of such policy shall be regarded as a subscriber so far as applicable under this law").

3

Third, the plaintiffs contend that Mobil's own employees adjusted Mobil's workers' compensation claims from 1965 to 1994, in violation of Texas law. They argue that this precludes summary judgment on the issue of whether Mobil qualified as a workers' compensation subscriber. After considering the arguments of the parties and the applicable state law, we again conclude that Mobil's actions were probably illegal. Again, however, we cannot conclude that these actions deprived Mobil of its subscriber status under state law.

The plaintiffs first cite to Tex. Ins. Code Ann. art. 1.14-1, which was repealed in 1999. Although it existed in various forms over the thirty-year period at issue, article 1.14-1 generally addressed unauthorized insurance. It included the act of adjusting claims or losses in the definition of "insurance business" and prohibited unauthorized persons or insurers from directly or indirectly doing the acts of an insurance business. *See, e.g., id.* § 2-3 (Vernon 1990). A violation of article 1.14-1 subjected the offending person or entity to administrative and civil penalties. *Id.* § 3. But the statute does not contain any language that could be interpreted to affect an employer's subscriber status. *Id.; see also* 28 Tex. Admin Code § § 65.5, 65.10 (suggesting that it is unethical and fraudulent for an insurer to allow an employer to adjust claims and that the remedy for such conduct is to ban the person from appearing before the workers' compensation board).

The plaintiffs attempt to buttress their argument by citing to *Aranda v. Insurance Co. of North America*, 748 S.W.2d 210 (Tex.1988), and *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695 (Tex.1994), for the proposition that Texas law requires "the

insurer or someone acting under the insurer's direct control to adjust claims, because of the insurers' duty of good faith and fair dealing" to the insured. This is undoubtedly an accurate reflection of Texas law. Neither *Aranda* nor *Natividad,* however, address the issue at hand: whether improper claims adjustment behavior by an employer prevents that employer from attaining subscriber status in Texas's workers' compensation system. Instead, *Aranda* and *Natividad* address the circumstances under which an employee may bring a tort action against a workers' compensation *insurer* for breach of the duty of good faith and fair dealing. *Natividad,* 875 S.W.2d at 697-98; *Aranda,* 748 S.W.2d at 211-14. Thus, they are almost entirely irrelevant.

Aranda and *Natividad* do offer one valuable insight into Texas workers' compensation law: together they indicate that the duty of good faith and fair dealing owed by an insurer to an employee is separate from the compensation claim and non-delegable. *Natividad,* 875 S.W.2d at 698; *Aranda,* 748 S.W.2d at 214. In *Natividad,* the workers' compensation insurer had contracted with an outside adjusting firm for the performance of claims handling services. 875 S.W.2d at 696. The Texas Supreme Court held that an employee's suit for breach of good faith and fair dealing was not viable against the adjusting firm because the insurer remained liable for "actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier." *Id.* at 698. If anything, *Natividad* indicates that Mobil's insurers would be liable to Mobil's employees for any improper claims handling under a tort theory of recovery, assuming that those employees could show the misdeeds amounted to a breach of the duty of good faith and fair dealing. In addition, the employees would almost certainly have to show that their tort claims were separate from their compensation claims and produced an independent injury. *See Aranda,*748 S.W.2d at 214.

Mobil may have risked administrative and civil penalties when it adjusted the workers' compensation

claims of its own employees, in violation of article 1.14-1. Likewise, Forum and the AIG Defendants may have risked tort liability or various civil sanctions by improperly allowing Mobil to adjust claims. But, even under this worst case scenario, Mobil's subscriber status was not invalidated.

Thus, despite the plaintiffs' vigorous arguments to the contrary, we conclude that there is no genuine issue of material fact with regard to Mobil's subscriber status.[15] And, in turn, there is no genuine issue of material fact that Mobil was engaged in a scheme to defraud its employees by lying about its subscriber status during the years in question. In light of the foregoing, we find that the district court correctly awarded summary judgment to the defendants with regard to the RICO suit.[16]

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[15] The plaintiffs also argue that the district court abused its discretion by refusing to allow them the opportunity to conduct any discovery. They argue that, had discovery been permitted, they could have created a genuine issue of material fact sufficient to survive summary judgment.

We review a district court's discovery decisions for abuse of discretion and affirm such decisions unless they are clearly unreasonable or arbitrary. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871, 876 (5th Cir.2000). We have reviewed the plaintiffs' various discovery motions and we find that the district court did not abuse its discretion. Although the plaintiffs probably could have discovered more factual information to support their arguments, the legal merits of those arguments would not have improved. In other words, any genuine issues of fact produced by the plaintiffs' discovery would not have been material. Thus, the district court properly concluded that the requested discovery was not likely to change the outcome of the summary judgment motion. *See, e.g., Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1401 (5th Cir.1993) (holding that it is not an abuse of discretion to preclude further discovery and enter summary judgment if it reasonably appears that further discovery would not create a genuine issue of material fact).

[16] The plaintiffs' RICO claims are predicated on Mobil's allegedly

fraudulent representations regarding its subscriber status. *See* note 10 *supra*. Because we conclude there is no genuine issue of material fact on this issue, the plaintiffs' RICO claims must fail. Thus, it is not necessary to discuss all the possible RICO issues in detail. We suspect, however, that the plaintiffs' complaint does not state a valid RICO claim for other reasons.

Even if we assume both that the plaintiffs had a valid property interest in their causes of action under Texas law and that Mobil deprived them of this property by fraudulently representing that it was a subscriber, we doubt the plaintiffs have satisfied the RICO standing requirement. A plaintiff may not sue under RICO unless he can show concrete financial loss. *In re Taxable Mun. Bond Secs. Litig.*, 51 F.3d 518, 523 (5th Cir.1995); *accord Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1310 (9th Cir.1992). It is undisputed that the plaintiffs received workers' compensation benefits from Mobil's insurers for each and every work-related injury at issue. Because it is unclear whether Mobil was negligent with regard to these injuries, it is possible that the plaintiffs ended up better off--that is, the plaintiffs may have recovered more by collecting workers' compensation benefits over the years than if they had exercised their right to sue. If this is in fact the case, then the plaintiffs have failed to show that they were injured at all, much less that they suffered the concrete injury required for RICO standing.

In addition, at the time of the injuries, the plaintiffs were notified by Mobil that it was a subscriber to Texas's workers' compensation system, chose not to opt-out, and recovered from Mobil on a no-fault basis for their various injuries. Thus, despite the plaintiffs' boilerplate damages allegations, it is hard to see how they received less than they were entitled to. *Cf. Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir.1998) (dismissing plaintiffs' RICO claims based on fraud because plaintiffs' conclusional allegations of injury failed to show that the plaintiffs received less than what they bargained for).

Moreover, this cause of action seems to stretch the bounds of RICO far beyond its intended purpose. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 165, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (reiterating that RICO is targeted primarily at organized crime). It may be that RICO's standing requirement that a plaintiff be "injured in his business or property" does not extend

IV

For these reasons, we find that the district court properly awarded summary judgment to the defendants and we AFFIRM.

AFFIRMED; DEFENDANTS' MOTIONS TO CERTIFY IS DENIED; PLAINTIFFS' MOTION FOR ABATEMENT OF THE APPEAL IS DENIED; PLAINTIFFS' MOTION FOR JUDICIAL NOTICE IS GRANTED IN PART AND DENIED IN PART; AIG DEFENDANTS' MOTION FOR JUDICIAL NOTICE IS DENIED.

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this far. 18 U.S.C. § 1964(c). At least one court has suggested that federal law should determine whether a given property interest, recognized by state law, rises to the level of RICO "business or property." *DeMauro v. DeMauro*, 115 F.3d 94, 96 (1st Cir.1997); *see also Price*, 138 F.3d at 607 ("And even though courts may look to state law to determine, for RICO purposes, whether a property interest exists, it does not follow that any injury for which a plaintiff might assert a state law claim is necessarily sufficient to establish a claim under RICO." (citations omitted)). If the federal threshold for "business or property" depends on the statutory purpose, then it seems clear that the instant RICO claims are meritless. *See DeMauro*, 115 F.3d at 96 (suggesting that the threshold does depend on RICO's purpose).

APPENDIX B: United States Court of Appeals for the Fifth Circuit Denial of Petitioner's Motion for Rehearing or Rehearing En Banc (August 7, 2003)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-40698

OZAN PATTERSON, Individually & as Rule 23 Class Representative on behalf of all other similarly situated individuals; JOHN BALLENGER, Individually & as Rule 23 Class Representatives on behalf of all other similarly situated individuals

Plaintiffs - Appellants

v.

MOBIL OIL CORPORATION; FORUM INSURANCE COMPANY; MOBIL CORPORATION; GLENDA MATOUSE, Individually & as agent for Mobil Oil Corporation; BEN STIFF, Individually & as agent for Mobil Oil Corporation; CHARLES TEEPLES, Individually & as agent for Mobil Oil Corporation; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA; AIG NATIONAL INSURANCE COMPANY; AIG RISK MANAGEMENT INC; AIG INC; ENERGY PRINTING INC; AMERICAN HOME ASSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendants - Appellees

THOMAS J BALLENGER

Plaintiff

ELLA RAY WHITEHEAD
Appellant

v.

MOBIL OIL CORPORATION
Defendant - Appellee

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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ON PETITION FOR REHEARING EN BANC

(Opinion 7/8/03, 5 Cir., ____, ____ F.3d ____)

Before EMILIO M GARZA and DeMOSS, Circuit Judges, and DUVAL,* District Judge.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing in DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and majority of the judges who are in regular active service not having voted in favor

(FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*District Judge of the Eastern District of Louisiana, sitting by designation.

Judges King, Higginbotham, Jones, Wiener and Clement did not participate in the consideration of the petition for rehearing en banc.

REHG- 6a

APPENDIX C: Final Judgment of the United States District Court for the Eastern District of Texas (March 29, 2002)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:99-CV-0156
AND
NO. 1:71-CV-0087

OZAN PATTERSON, and JOHN BALLENGER, INDIVIDUALLY and as RULE 23 CLASS REPRESENTATIVES ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS

VS.

MOBIL OIL CORPORATION, FORUM INSURANCE COMPANY, MOBIL CORPORATION, GLENDA MATOUS, ROBERT GRONWALDT, INDIVIDUALLY and AS AGENTS FOR MOBIL OIL CORPORATION, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, AMERICAN HOME ASSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AIG NATIONAL INSURANCE COMPANY, AIG RISK MANAGEMENT, INC., AND AIG, INC.

FINAL JUDGMENT

In accordance with the memorandum opinions entered in the above captioned causes this date, it is hereby ORDERED as follows:

The motions to recuse or disqualify are hereby DENIED.

The request to reopen Cause No. 1:71-CV-87 is DENIED, and the cause is closed.

The motions to intervene are DENIED.

Defendants' motion for summary judgment is GRANTED.

All relief not specifically granted herein is DENIED as moot.

Costs of court are taxed against the plaintiffs.

SIGNED this 28th day of March, 2002.

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HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX D: Decision of United States Court of Appeals for the Fifth Circuit Denying a Writ of Mandamus (January 10, 2000).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-40001

In Re: OZAN PATTERSON, Individually & as Rule 23 Class Representative on behalf of all other similarly situated individuals; JOHN BALLENGER, Individually & as Rule 23 Class Representative on behalf of all other similarly situated individuals

Petitioners

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

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Before EMILIO M. GARZA and DENNIS, Circuit Judges.*

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus is DENIED.

*This order is being entered by a quorum of this court pursuant to 28 U.S. C. 46(d).

APPENDIX E: Order of the United States District Court Denying Disqualification (December 21, 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OZAN PATTERSON AND JOHN	§
BALLENGER, INDIVIDUALLY AND	§
AS RULE 23 CLASS REPRESENTATIVES,	§
ON BEHALF OF ALL OTHER SIMILARLY	§
SITUATED INDIVIDUALS	§
	§
V.	§
	§
MOBIL OIL CORPORATION, FORUM	§
INSURANCE COMPANY, MOBIL	§
CORPORATION, GLENDA MATOUS,	§
ROBERT GRONWALDT, INDIVIDUALLY,	§
AND AS AGENT FOR MOBIL OIL	§
CORPORATION, NATIONAL UNION	§
FIRE INSURANCE COMPANY OF	§
PITTSBURG, PENNSYLVANIA,	§
AMERICAN HOME ASSURANCE	§
COMPANY, INSURANCE COMPANY OF	§
THE STATE OF PENNSYLVANIA, AIG	§
NATIONAL INSURANCE COMPANY,	§
AIG RISK MANAGEMENT, INC., AND	§
AIG, INC.	§

ORDER

The motion to disqualify this Judge filed December 20, 1999 at 3:22P.M. by Gilbert T. Adams, Esq. alleging some sort of participation by John G. Tucker, Esq. and the firm of Orgain, Bell & Tucker in the alleged fraudulent conduct of the defendants is DENIED. A careful review of the 105 page

complaint does not refer to John G. Tucker or Orgain, Bell & Tucker in any manner, nor are either Mr. Tucker or the firm of Orgain, Bell & Tucker named as conspirators, co-conspirators, or defendants, nor are they accused of any criminal or civil wrongdoing.

For this reason, the court refuses to enter the proffered order for disqualification.

SIGNED this 21st day of December, 1999.

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Howell Cobb
United States District Judge

APPENDIX F: Opinion of United States Court of Appeals for the Fifth Circuit Vacating Class Certification, 241 F.3d 417 (5th Cir. 2001).

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 00-40086.

OZAN PATTERSON, Individually & as Rule 23 Class Representative on behalf of all other similarly situated individuals; John Ballenger, Individually & as Rule 23 Class Representatives on behalf of all other similarly situated individuals,

Plaintiffs-Appellees,

versus

MOBIL OIL CORPORATION; Forum Insurance Co.; Mobil Corp.; Glenda Matouse, Individually & as Agent for Mobil Oil Corporation; Robert Gronwaldt, Individually & as Agent for Mobil Oil Corporation; National Union Fire Insurance Company of Pittsburgh, PA; AIG National Ins. Co.; AIG Risk Management, Inc.; American International Group Incorporated; American Home Assurance Company; Insurance Company of the State of Pennsylvania,

Defendants-Appellants.

Appeal from the United States District Court
For the Eastern District of Texas

February 5, 2001.

Before HIGGINBOTHAM and DeMOSS, Circuit Judges, and KENT*, District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

I

This is a class action asserting RICO claims brought by employees of Mobil. The putative class asserts that Mobil failed to comply with Texas law requiring an employer to obtain workers' compensation insurance in order to benefit from the bar of negligence suits by injured employees. The complaint alleges that Mobil obtained insurance or re-insurance from wholly owned subsidiaries; assertedly this was not sufficient to make Mobil a qualifying subscriber to the workers' compensation system. This, because it did not transfer risk away from Mobil and therefore was not "insurance" within the meaning of the workers' compensation statute.

The complaint requested class certification. It defined the class as all employees of Mobil in Texas whose injuries in workplace accidents between the years 1965 and 1993 generated a workers' compensation claim. The theory was that these workers were injured because Mobil's representation that it properly had workers' compensation insurance, assertedly fraudulent, caused these injured employees to forgo negligence lawsuits against Mobil.

Shortly before his death, the Honorable Judge Joe J. Fisher, of the Eastern District of Texas, certified a bifurcated class under Federal Rule of Civil Procedure 23(b)(3), consisting of a class of employees injured between 1965 and 1981 and a class of employees injured between 1982 and 1993. These periods correspond to changes in Mobil's insurers. Three days later, Judge Fisher recused himself from the case, *sua sponte* and without explaining his reasons.

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* District Judge of the Southern District of Texas, sitting by designation.

We granted Mobil's petition for leave to appeal the certification order under Rule 23(f). Mobil argues that the certification order should be vacated because Judge Fisher recused himself immediately after entering it and because the class certification was otherwise improper.

II

We review a district court's certification of a class for abuse of discretion.[2] Rule 23(a) requires the plaintiff to show that the class is too numerous to allow simple joinder; there are common questions of law or fact; the claims or defenses of the class representatives are typical of those of the class; and the class representatives will adequately protect the interests of the class.[3] To receive (b)(3) certification, a plaintiff must also show that the common issues predominate, and that class treatment is the superior way of resolving the dispute.[4]

Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain. We recently held that "a fraud class action cannot be certified when individual reliance will be an issue."[5] Recently, in *Bolin v. Sears, Roebuck & Co.*,[6] we applied that rule to civil RICO claims. We do so again, concluding that the district court erred as a matter of law in certifying this class because the predominance requirement could not be met.

In *Bolin*, we reviewed an order certifying a class

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[2] *See Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 265 (5th Cir.2000).

[3] Fed.R.Civ.P. 23(a).

[4] Fed.R.Civ.P. 23(b)(3).

[5] *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir.1996).

[6] 231 F.3d 970, 978-79 (5th Cir.2000).

comprised of debtors claiming unfair collection practices by Sears. The class alleged violations of the bankruptcy laws, the Fair Debt Collection Practices Act, the Truth in Lending Act, and RICO. We held that consideration of class certification should proceed on a claim by claim basis, with reference to the statutory elements of and remedies for each claim.[7] In regard to the RICO claims, we held that "the individual findings of reliance necessary to establish RICO liability and damages preclude not only (b)(2) certification of this class under RICO, but (b)(3) certification as well."[8]

Each member of this putative class must then prove reliance upon Mobil's alleged fraud in stating it was covered by workers' compensation insurance.[9] To do that, each plaintiff would have to make an individual showing that she could have and would have sued Mobil, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers' compensation regime.

While there may be an issue of fact common to all class members--the question of whether or not Mobil was a valid subscriber to the workers' compensation system--that question does not predominate over the question of whether or not each member of the class suffered a RICO injury. We so held on the facts of *Bolin*,[10] and on the facts of *Castano v. American Tobacco Company*,[11] and we see no compelling distinction here. To determine reliance for each individual class member would defeat the economies ordinarily

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[7] *See id.* at 976.

[8] *Id.* at 978.

[9] *See Summit Properties Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir.2000) (holding that reliance is an element of a civil RICO claim based on injuries from fraud).

[10] 231 F.3d at 978.

[11] 84 F.3d at 745.

associated with the class action device. An effort to decide only the question of whether Mobil was effectively insured under the Texas compensation scheme would be no more than the trial of an abstraction--for which subclassing and bifurcation is no cure.

III

In light of our holding that class certification was improper, we need not address the effect of the district judge's recusal on his earlier order certifying the class.[12] Class certification was improper under Rule 23. The order granting class certification is therefore VACATED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

VACATED and REMANDED.

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[12] We granted leave to appeal the order granting class certification and express no opinion regarding Mobil's entitlement to the protective bar of the state workmen's compensation law.

APPENDIX G: Order of the United States District Court for Eastern District of Texas on Class Certification (December 10, 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OZAN PATTERSON and JOHN BALLENGER, INDIVIDUALLY, AND AS RULE 23 CLASS REPRESENTATIVES ON BEHALF OF ALL OTHER SIMILARLY SITUATED INDIVIDUALS	§
vs.	CIVIL ACTION NO 1:99CV0156
MOBIL OIL CORPORATION, FORUM INSURANCE COMPANY, MOBIL CORPORATION, GLENDA MATOUS ROBERT GRONWALDT, INDIVIDUALLY AND AS AGENTS FOR MOBIL OIL CORPORATION, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, AMERICAN HOME ASSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, AIG NATIONAL INSURANCE COMPANY, AIG RISK MANGEMENT, INC., and AIG, INC.	§ JURY DEMANDED

ORDER

The Court, having considered (1) Plaintiffs' Motion for Class Certification, Defendants' Opposition to that Motion, and any other briefing regarding that Motion, and

(2) Defendants Mobil Oil Corporation and Mobil Corporation's Motion for Abstention, Plaintiffs' Opposition to that Motion, and any other briefing regarding that Motion, along with the evidence, the pleadings on file, and the arguments of counsel, ORDERS that Plaintiffs' Motion for Class Certification is GRANTED and that Defendants' Motion for Abstention is DENIED.

Pursuant to Fed. R. Civ. P. 23(b)(3), the Court ORDERS that the following class of plaintiffs be certified in the above action:

> All persons employed by Mobil Oil Corporation in Texas at any time during the time period January 1, 1965 to December 31, 1993, who in connection with such employment, sustained a work-related injury or occupational disease that resulted in physical injury or death and/or any person possessing a derivative claim as a result of such death, injury, or occupational disease, where the injured person and/or the injured person's survivors filed a workers' compensation claim and/or a lawsuit in connection with the death, injury, or occupational disease.

The Court further ORDERS the creation of two subclasses:

> (1) All persons whose lost or damaged cause(s) of action relate to workplace injuries that took place between January 1, 1965 and December 31, 1981.

(2) All persons whose lost or damaged cause(s) of action relate to workplace injuries that took place between January 1, 1982 and December 31, 1993.

The court further ORDERS that trial of this action shall proceed in multiple phases, divided as follows:

(1) Phase One - The Court will try the following issues: (1) whether Mobil Oil was a "subscriber" under the Texas workers' compensation laws; and (2) whether there exist the elements of a federal RICO claim.

As to the first issue of workers' compensation subscriber status, the Court will submit separate questions to the jury for each subclass.

(2) Phase Two - The Court will conduct a series of "mini-trials" to determine the damages, if any, of individual class members.

The Court further ORDERS Defendants to provide Plaintiffs by January 10, 2000, a list, in machine readable format, of all persons who come within the class defined above, along with the last-known address of those persons, the last-known telephone number of those persons, and the social security numbers of those persons.

The court further ORDERS Plaintiffs to submit a proposed form of notice to class members by December 24,

1999. Defendants shall have until January 10, ~~1999~~ 2000 to submit any objections to the form of notice.

SIGNED this 10 day of December, 1999.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX H: Relevant Constitutional and Statutory Provisions.

The Fifth Amendment to the United States Constitution is reproduced below.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

Title 28, Section 144 of the U.S. Code, Bias or prejudice of judge, is reproduced below.

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit

in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

Title 28, Section 455 of the U.S. Code, Disqualification of justice, judge, or magistrate judge, is reproduced below.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary

interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455.

VERNON'S TEXAS STATUTES AND CODES
ANNOTATED CIVIL STATUTES
TITLE 130--WORKERS' COMPENSATION AND CRIME VICTIMS COMPENSATION
PART 4

Art. 8309, § 1. Repealed by Acts 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(15), eff. Jan. 1, 1991

Section 1 of Art. 8309, prior to repeal, read as follows:

Definitions and general provisions . . .

'Association' shall mean the 'Texas Employers' Insurance Association' or other insurance company authorized under this Act to insure the payment of compensation to injured employees or to the beneficiaries of deceased employees.

'Subscriber' shall mean any employer who has become a member of the association by paying the required premium; provided that the association holds a license issued by the Commissioner of Insurance, as provided for in Section 12, Part 3, of this Act.

TX Civ. St. Art. 8309, § 1

APPENDIX I: *Kirkendall v. National Union Fire Ins. Co. of Pittsburg, PA*, No. A-144,481-D (D. Tex. May 30, 2003)

NO. A-144,481-D

LONZO KIRKENDALL and PATRICIA WAGNER	§ IN THE DISTRICT COURT OF
VS.	§ JEFFERSON COUNTY, TEXAS
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, ET AL.	§ 58TH JUDICIAL DISTRICT

FINAL JUDGMENT

On the 12th day of May, 2003, came on to be heard the cause above. Lonzo Kirkendall and Patricia Wagner, Plaintiffs, appeared in person and by counsel of record and announced ready for trial and defendants, ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation, and American International Group, Inc., and AIG Risk Management, Inc., and National Union Fire Insurance Company of Pittsburgh, PA, and Insurance Company of the State of Pennsylvania, and GE Casualty Insurance Company f/k/a Forum Insurance Company, and Glenda Matous, and Robert Gronwaldt appeared by counsel of record, and a jury having

been previously demanded, a jury consisting of twelve qualified jurors was duly impaneled and the case proceeded to trial. During the trial, one juror was excused from further service as being disabled from serving pursuant to Tex.R.Civ.P. 292. At the conclusion of the evidence and argument of counsel, the Court submitted the "Phase I" questions of fact in the case to the jury on May 21, 2003; and the jury returned its verdict on May 21, 2003. The charge of the court and verdict of the jury in "Phase I" are attached hereto as Exhibit "A" and are incorporated herein for all purposes by reference. The verdict of the jury appeared to be for the plaintiff and against the defendant, and it appeared to the Court that the jury had found by its responses that Defendant Mobil did not have a policy of genuine workers compensation insurance for the years 1978, 1984, 1988, and 1993.

The Court therefore found, and herein again so finds, that the defense of having genuine workers compensation insurance was not available to Defendants. The Court therefore found, and herein again so finds, that there was

not a "workers compensation insurance policy" against which a claim for benefits could be made and thus pretermitted any further consideration of the "old law workers comp appeals" which constituted, in part and in the alternative, the allegations of Lonzo Kirkendall and Patricia Wagner with respect to their carpal tunnel injuries.

The Court then proceeded to "Phase II" in accordance with the rulings and findings made in the preceding paragraph.

On May 22, 2003, after further evidence and argument of counsel, the jury retired to deliberate on the questions of fact propounded to it in "Phase II." On May 23, 2003, the jury returned its verdict on "Phase II." The charge of the court and verdict of the jury in "Phase II" are attached hereto as Exhibit "B" and are incorporated herein for all purposes by reference. The verdict of the jury appeared to be for the plaintiff and against the defendants in part, and in favor of the defendants and against the plaintiffs in part.

It is, therefore ORDERED by the Court that Plaintiff, Lonzo Kirkendall, have and recover from ExxonMobil Oil

Corporation f/k/a Mobil Oil Corporation, Defendant, the sum of $10,000.00 as actual damages and the sum of $10,000.00 as exemplary damages. It is further ORDERED by the Court that Plaintiff, Patricia Wagner, have and recover from ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation the sum of $25,000.00 as actual damages and the sum of $10,000.00 as punitive damages.

It is further ORDERED by the Court that Lonzo Kirkendall, Plaintiff, have and recover from ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation, Defendant, pre-judgment interest on such actual damages beginning on September 23, 1993, the date his lawsuit was filed, until the day this judgment is signed, May 28, 2003. The total amount of pre-judgment interest for Lonzo Kirkendall is $9,666.67.

It is further ORDERED by the Court that Patricia Wagner, Plaintiff, have and recover from ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation, Defendant, pre-judgment interest on such actual damages beginning on August 10, 1984, six months after she gave notice of claim, until the day this judgment is signed, May 28, 2003. The total

amount of pre-judgment interest for Patricia Wagner is $46,979.17.

It is further ORDERED by the Court that Plaintiffs recover the taxable court costs in this matter, recoverable in equal parts by Lonzo Kirkendall and Patricia Wagner, which are in total $36,596.70.

It is further ORDERED by the Court that the sum of the actual damages and prejudgment interest, and taxable court costs to be collected by the plaintiff, Lonzo Kirkendall, from ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation, Defendant, equals $37,965.02.

It is further ORDERED by the Court that the sum of the actual damages and prejudgment interest, and taxable court costs to be collected by the plaintiff, Patricia Wagner, from ExxonMobil Oil Corporation f/k/a Mobil Oil Corporation, Defendant, equals $90,277.52.

It is further ORDERED that the judgment here rendered shall bear post-judgment interest at the rate of 10 percent per annum from the date this judgment is signed, until paid.

It is hereby ORDERED that all Writs and processes that

may be necessary in the enforcement and the collection of this judgment shall be allowed.

All relief not expressly granted is denied. This is a final judgment as to all claims by or against Lonzo Kirkendall and Patricia Wagner.

SIGNED this 30 day of May, 2003.

/s/
JAMES W. MEHAFFY
JUDGE PRESIDING

APPENDIX J: Defendants' Response To Plaintiffs' Motion For Clarification And Reonsideration Of Court's Order (April 12, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

OZAN PATTERSON and JOHN BALLENGER, Plaintiffs	§	
	§	CIVIL ACTION
	§	NO.
vs.	§	1:99CV0156
	§	JUDGE
	§	HOWELL COBB
MOBIL OIL CORPORATION, ET AL	§	JURY
	§	DEMANDED

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLARIFICATION AND REONSIDERATION OF COURT'S ORDER OF APRIL 12, 2001

TO THE HONORABLE COURT:

Defendants[1] oppose Plaintiffs' Motion for Clarification and Reconsideration of Court's Order of April

[1] The defendants are: Mobil Oil Corporation ("Mobil"); Forum Insurance Company ("Forum") n/k/a Colonial Penn Franklin Insurance company; Mobil Corporation; Robert Gronwaldt; Glenda Matous; National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union"); American Home Assurance Company ("American Home"); Insurance Company of the State of Pennsylvania ("ISOP"); AIG National Insurance

12, 2001 (the "Motion"). As discussed below, the Motion lacks merit and should be in all things denied.

I.

Background

1. On December 20, 1999, Plaintiffs filed their first motion to disqualify the Honorable Howell Cobb from presiding over this case. That motion was denied on December 21, 1999. Plaintiffs' requests for extraordinary mandamus relief from this Court's denial of disqualification were rejected by the U.S. Court of Appeals for the 5th Circuit. Undeterred, Plaintiffs filed a second motion to disqualify the Honorable Howell Cobb on March 23, 2001, and have since filed a third motion to disqualify.

2. Also on March 23, 2001, Plaintiffs filed a Rule 56(f) motion for additional time for discovery and served defendants with notices for twenty-one (21) depositions. This motion contained no certificate of conference, and did not request an oral hearing. The Plaintiffs then

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Company; AIG Risk Management, Inc.; and American International Group, Inc., sued as AIG, Inc.

supplemented the motion for additional discovery by filing a motion requesting an oral hearing of that motion. Defendants opposed the motion for additional discovery and moved to quash the depositions. On April 12, 2001, this Court entered an Order denying Plaintiffs' Rule 56(f) motion for additional discovery and request for oral hearing thereof, and granting Defendants' motion to quash ***"until further order of this Court."*** Order of April 12, 2001, at 4.

3. In its April 12 Order, this Court specifically noted that it had pending before it Plaintiffs' motion to disqualify this Court, and that this Court had not yet had an opportunity to rule on that motion. This Court further noted that it has pending before it a motion for summary judgment by all Defendants which, if granted, could be dispositive of this case. As such, this Court exercised its discretion in denying the motion for additional discovery without an oral hearing, and granting Defendants' motion to quash the 21 depositions. Order of April 12, 2001, at 3-4, citing *Corwin v. Marney, Ortin Inv.*, 843 F.2d 194, 2000 (5th Cir. 1988), and *Petrus v. Bowen*, 833 F.2d 581, 583 (5th Cir. 1987).

4. Plaintiffs now, *more than six (6) weeks after the April 12, 2001 Order, seek a "clarification" of this Court's ruling,* claiming: (a) the court lacked authority to enter the order; (b) the Court should have granted an oral hearing on their Rule 56(f) motion for additional discovery; and, alternatively, (c) the court should reconsider the permissible discovery pending resolution of Defendants' motion for summary judgment in light of Judge Fisher's discovery control order signed more than a year before Defendants' filed their summary judgment motion.

II.

Argument and Authorities

4. The Court had authority to issue the April 12, 2001 Order.

This Court is within its discretion to limit discovery pending this Court's ruling on the motions to disqualify.[2] Plaintiffs' repeated attempts to disqualify this Court do not preclude this Court "from ruling on any other motion or

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[2] Both motions to disqualify are labeled as "supplemental." Defendants have responded to both motions, and both are before this Court for consideration.

taking any other action, other than referral of the Motion to Disqualify to another judge." Likewise, Plaintiffs are wrong in stating that "orders entered by a disqualified judge are void." This Court has authority to decide the disqualification motion, and the orders it enters before and after deciding that motion are subject to a harmless error review in the even the court should have disqualified himself.[3] *See In re Continental Airlines Corp.*, 901 F.2d 1259, 1263 (5th Cir. 1990), *cert. denied*, 506 U.S. 828 (1992)(harmless error rule applies in review of a summary judgment entered by a judge who should have recused himself); *U.S. v. O'Keefe*, 128 F.3d 885, 892-93 (5th Cir. 1997)(district judge's ruling on motion for reconsideration after his recusal was harmless error and does not have to be vacated); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 458-59 (5th Cir. 1996)(violation of post-

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[3] Although language in the sole case cited by plaintiffs, *Republic of Panama v. American Tobacco Co.*, 217 F.3d 343, 347 (5th Cir. 2000), suggest that all decisions made by a trial court who should have recused himself must be vacated, that decision cannot be read so broadly without bringing it in conflict with earlier 5th Circuit decisions. The earlier decisions control if the decisions conflict. *See Smith v. Penrod Drilling Corp.*, 960 F.3d 456, 459 (5th Cir. 1992); *Heitkamp v. Dyke (In re Dyke)*, 943 F.2d 1435, 1442-43 (5th Cir. 1991); *Pruitt v. Levi Straus & Co.*, 932 F.2d 458, 465 (5th Cir. 1991); *Boyd v. Puckett*, 905 F.2d 895, 897 (5th Cir.) *cert. denied*, 498 U.S. 988 (1990); *Newell Companies, Inc. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

recusal adjudication rule does not automatically vacate post-recusal orders). Accordingly, the Court acted within its authority in entering the April 12 Order.

5. An oral hearing on Plaintiffs' Rule 56(f) motion is unnecessary.

While Defendants neither opposed nor agreed to Plaintiffs' motion for oral hearing, this Court properly noted that Defendants were vigorously opposed to any additional discovery pending resolution of their motion for summary judgment. Defendants demonstrated in their response to that motion that the discovery Plaintiffs sought should not be permitted before the Court ruled on summary judgment because it would not create a genuine issue of material fact. While Plaintiffs requested an oral hearing, they filed no reply to Defendants' response, and have presented no new facts or authority supporting their motion for reconsideration. A hearing on a motion is not required even if properly requested. *See* Local Rules CV-7 ("A party may in a motion or a response specifically request an oral hearing, *but the*

allowance of an oral hearing shall be within the sole discretion of the Judge to whom the motion is assigned.") (emphasis added).

6. The motion for summary judgment should be heard before additional discovery is conducted.

Plaintiffs also seek an order conforming this Court's April 12, 2001 Order with an order entered by Judge Fisher on October 5, 1999. The Plaintiffs offer no new facts or argument that their Rule 56(f) motion should not result in an order different than the order governing these proceedings before Defendants filed their motion for summary judgment. Plaintiffs were the parties both (1) requesting this Court to change the discovery schedule in light of Defendants' motion for summary judgment and (2) unilaterally ignoring the existing order in noticing twenty-one (21) depositions. Plaintiffs' complaint that the summary judgment motion should not be taken into account in scheduling discovery, but that discovery should be controlled by an order entered more than a year before the summary judgment motion was filed, is disingenuous at best. Staying, or otherwise altering, discovery pending resolution of a dispositive motion is well

within this Court's discretion. *Corwin*, 843 F.2d at 200; *Petrus*, 833 F.2d at 583. Plaintiffs have presented no new facts or authority establishing a need or requirement for additional discovery before this Court takes up Defendants' summary judgment motion. Accordingly, reconsideration should be denied.

III.

Conclusion and Prayer

Plaintiffs have not sustained their burden to establish that this Court's April 12, 2001, Order should be vacated, altered or clarified. Accordingly, Plaintiffs' "Motion for Clarification and Reconsideration of Court's Order of April 12, 2001" should be in all things denied.

Respectfully submitted,

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